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Workplace Safety - The Prophylactic and Compensatory Rights of the Employee.

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WORKPLACE SAFETY—THE PROPHYLACTIC AND COMPENSATORY RIGHTS OF THE EMPLOYEE

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I. INTRODUCTION

We are talking about people's lives, not the indifference of some cost accountants. We are talking about assuring the men and women who work in our plants and factories that they will go home

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after a day's work with their bodies intact.[1]

In the 1970's employees were given a new right—the enforceable right to a safe place to work.[2] The right to safe employment is not a new concept, but one which has been embedded in the common law for years.[3] It is, however, a right which was long unenforced in American courts. Although American jurisprudence previously had recognized the common law and state statutory measures designed to achieve the goal of workplace safety, the opinions were often idle words with little attendant enforcement.[4] Not until 1976 did an American court hold the employer accountable to his common law duty to provide reasonably safe employment.[5] Prior to that time the "what is good for big business is good for America" philosophy left employees' rights at the wayside,[6] while employers were given a free hand to industrialize America at the expense of the lives of the American working class.

The employee's right to safety and health emanates from the employment contract.[7] As in the "social contract" theory of government,[8] the employment contract is a trade-off of man's natural rights for the common good.[9] As man combined forces to form society and government, he joined hands to form economic enterprises

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1. 116 Cong. Rec. 37625 (1970) (Senator Ralph Yarborough); Whirlpool Corp. v. Marshall, 445 U.S. 1, 11 n.16, (1980). Senator Ralph Yarborough was a sponsor of the Senate Bill on the Occupational Safety and Health Act. *Id.* at 11 n.16.

2. *Cf.* 29 U.S.C. §§ 652-78 (1978) (Occupational Safety and Health Act) (designed to assure every working man safe and healthful working conditions).

3. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 526 (4th ed. 1971).

4. *See* Atlas Roofing Co. v. Occupational Safety and Health Rev. Comm'n, 430 U.S. 442, 444-45 (1977) (state statutory and common law remedies inadequate).

5. Note, 30 VAND. L. REV. 1074, 1081 (1977); Shrimp v. New Jersey Bell Telephone Co. was the first judicial recognition of the common law right to compel an employer to eliminate unsafe work conditions. *See* Shrimp v. New Jersey Bell Tel. Co., 368 A.2d 408, 411 (N.J. Ch. 1976).

6. *See* Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 223 (1952) (author notes "the desire of judges to encourage industrial enterprise by making the burdens as light as possible.")

7. *See* Pioneer Cas. Co. v. Bush, 457 S.W.2d 165, 169 (Tex. Civ. App.—Tyler 1970, writ ref'd n.r.e.); *see also* Jernigan v. Lay Barge Delta Five, 296 F. Supp. 127, 129 (S.D. Tex. 1969), *aff'd*, 423 F.2d 1327 (5th Cir. 1970).

8. For a discussion of the social contract of government, see, J. ROUSSEAU, THE SOCIAL CONTRACT (1762); J. Locke, *An Essay Concerning the True Original Extent and End of Government*, TWO TREATISES OF GOVERNMENT, BOOK II (1690).

9. *See* J. Locke, *An Essay Concerning the True Original Extent and End of Government*, TWO TREATISES OF GOVERNMENT, BOOK II at 85 (1690).

which resulted in the employment relationship. Man gave up his right to toil independently for himself and instead began to work conjunctively with others. In this respect, the employee gave up some of his individual rights and freedoms in exchange for the security of the employment position.[10] The employer, alternatively, has also accepted the duty to protect the rights and freedoms retained by the employee. One such right retained by the employee is the right to good health and safety, lead the common law to recognize the duty of the employer to guard his employees against needless injuries and to provide reasonably safe employment conditions.[11]

This article will examine the common law and statutory rights of the employee to workplace safety in the industrialized America of the 1980's.

II. Common Law And Statutory Right To A Safe Place To Work

One area of concern to the employee when entering the employment contract is working conditions, and more particularly, whether the employment site is free from unreasonable risk of harm to life or limb. Although it may be said the employee assumes the condition of the worksite by accepting a position with a particular employer, the employee does not assume the risk of bodily injury.[12]

As noted, when the employee enters into the employment contract he gives up some of his personal rights in exchange for compensation from the employer. The right to be free from unreasonable bodily injury, however, is an inalienable right and, therefore, is

10. Some of the rights and freedoms given up by the employee in accepting the employment position include: the method and manner of performing the work; the time and place for performing the work; and, most significantly, the independence he surrenders by becoming subject to the control of the employer. *See* Thomas v. Hycon, Inc., 244 F. Supp. 151, 155 (D.D.C. 1965) (factors for determining employer-employee relationship); W. Prosser, Handbook Of The Law Of Torts 460 (4th ed. 1971) (elements of servant-independent servant relationship).

11. *See* Hough v. Railway Co., 100 U.S. 213, 217 (1879); Farley v. M M Cattle Co., 529 S.W.2d 751, 754 (Tex. 1975).

12. Even the employee cannot contract away the employer's liability under the employment contract. *See* Southwestern Bell Tel. Co. v. Gravit, 551 S.W.2d 421, 425 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.); 6A A. Corbin, Corbin on Contracts § 1472, at 592 (1961).

not given up by the employee in exchange for the job. Rather, the employer, by hiring the employee, assumes the duty to protect his employee from injury or death.[13]

In Anglo-American jurisprudence, legally enforceable duties arise in two fashions: in contract or in tort.[14] Because of the common origin of modern tort and contract law,[15] the legally recognized duties of the employer to the employee regarding worksite safety are interchangeably referred to as warranty and negligence.[16] At common law, the employer was not an insurer of the employee's safety.[17] The employer, however, assumed the obligation to protect his employees from perils and hazards within his control.[18] The employer's duties include the duty to warn employees as to hazards of their work and to supervise their activities, the duty to furnish a reasonably safe place in which to labor, and the

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13. *See, e.g.*, Hough v. Railway Co., 100 U.S. 213, 217 (1879); Farley v. M M. Cattle Co., 529 S.W.2d 751, 752 (Tex. 1975); Leadon v. Kimbrough Bros. Lumber Co., 484 S.W.2d 567, 568 (Tex. 1972). In *Hough*, the Supreme Court explained this duty as:

> [T]he obligation of the master, whether a natural person or corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master. To that end the master is bound to observe all care which prudence and exigencies of the situation require, in providing the servant with machinery or instrumentalities adequately safe for use by the latter.

Hough v. Railway Co., 100 U.S. 213, 217 (1879).

14. *See* L. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS 1 (2d ed. 1965) (a contract is an obligation which the law will enforce); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 4 (4th ed. 1971) (torts consist of breaches of duties imposed upon parties by the law).

15. *E.g.* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 637-46 (5th ed. 1956) (contract action of assumpsit developed from tort action of trespass).

16. *Cf.* Hough v. Railway Co., 100 U.S. 213, 217-20 (1879) (cases cited by Supreme Court refer to breaches of employers' duty as negligence or breach of warranty, interchangeably).

17. *See, e.g.*, Baltimore & Ohio Southwestern. R.R. v. Carrol, 280 U.S. 491, 496 (1930); Fort Worth & Denver City Ry. v. Smith, 206 F.2d 667, 669 (5th Cir. 1953); Commercial Standard Ins. Co. v. Martin, 363 S.W.2d 228, 229 (Tex. 1962). For a discussion on how modern worker's compensation statutes have changed this common law rule, see the section on worker's compenstion, *infra*.

18. Hough v. Railway Co., 100 U.S. 213, 217 (1879); *see, e.g.*, Farley v. M M Cattle Co., 529 S.W.2d 751, 752 (Tex. 1975); Leadon v. Kimbrough Bros. Lumber Co., 484 S.W.2d 567, 568 (Tex. 1972); Frontier Theatres, Inc. v. Brown, 362 S.W.2d 360, 370 (Tex. Civ. App.—El Paso 1962), *rev'd on other grounds*, 369 S.W.2d 299 (Tex. 1963). In *Frontier Theatres, Inc. v. Brown*, the El Paso Court of Civil Appeals held that an employer owes an employee on the employer's premises in the scope of his employment, that any owner or possessor of similar premises owes to a business invitee. *See* Frontier Theatres, Inc. v. Brown, 362 S.W.2d 360, 370 (Tex. Civ. App.—El Paso 1962), *rev'd on other grounds*, 369 S.W.2d 299 (Tex. 1963); *see also* RESTATEMENT OF TORTS § 497b (1948 Supp.).

duty to furnish reasonably safe instrumentalities with which employees are to work.[19] The employer is liable for any injury resulting from the breach of any of these duties.[20]

At common law, under the employment contract the employee risks dangers which ordinarily attend or are incidental to the business in which he voluntarily engages.[21] These are risks which the employee himself is presumed to be better able to prevent, such as careless or dangerous work habits of fellow servants with whom he has had an opportunity to become acquainted.[22] The employee, however, is not presumed to risk the negligence of his employer in failing to carry out the duty to provide the employee with a safe place to work free from perils and hazards within the employers control.[23] At common law, the employer was liable for his negligent activity[24] and that of those under his control,[25] but was not responsible for injuries resulting from activities beyond his control or which occurred despite his exercise of due care.[26]

With the growth of the modern industrial society, many legislatures have passed statutory legislation designed to protect the working man from hazardous working conditions.[27] In 1967 the

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19. Farley v. M M Cattle Co., 529 S.W.2d 751, 754 (Tex. 1975); *see* Hough v. Railway Co., 100 U.S. 213, 217 (1879).

20. *See, e.g.*, Hough v. Railway Co., 100 U.S. 213, 217 (1879); Farley v. M M Cattle Co., 529 S.W.2d 751, 754-55 (Tex. 1975); Leadon v. Kimbrough Bros. Lumber Co., 484 S.W.2d 567, 568-70 (Tex. 1972).

21. Hough v. Railway Co., 100 U.S. 213, 217 (1879).

22. *See id.* at 217. For a discussion on the fellow servant doctrine, see the section on employee's right to compensation for injury, *infra*.

23. Hough v. Railway Co., 100 U.S. 213, 217 (1879). In Farley v. M M Cattle Co., 529 S.W.2d 751, 758 (Tex. 1975), the Texas Supreme Court expressly held that *volenti non fit injuria* (assumption of the risk) is not a defense to an employer's negligent acts. Thus, the mere fact that an employee accepted the work task is no defense to injuries resulting from the employer's negligence. *Id.* at 758.

24. *See* Hough v. Railway Co., 100 U.S. 213, 217 (1879); Cabrera v. Delta Brands, Inc., 538 S.W.2d 795, 799 (Tex. Civ. App.—Texarkana, 1976, writ ref'd n.r.e.).

25. *See, e.g.*, Hough v. Railway Co., 100 U.S. 213, 219, (1879) (master liable for acts of agents); Farley v. M M Cattle Co., 529 S.W.2d 751, 756 (Tex. 1975) (master liable for failure of foreman to supervise); Medlin Milling Co. v. Bootwell, 133 S.W. 1042, 1043 (Tex. 1911) (employer liable for danger known to him even though caused by strangers).

26. The employer was not an insurer at common law. *See, e.g.*, Baltimore & Ohio Southwestern R.R. v. Carrol, 280 U.S. 491, 496 (1930); Fort Worth & Denver City Ry. v. Smith, 206 F.2d 667, 669 (5th Cir. 1953); Commercial Standard Ins. Co. v. Martin, 363 S.W.2d 228, 229 (Tex. 1962).

27. *See, e.g.*, 29 U.S.C. §§ 651-78(1976) (Occupational Safety and Health Act); TEX. REV. CIV. STAT. ANN. arts. 5173-78 (Texas Health Safety and Morals Act); (Vernon Pamp.

Texas Legislature passed the Occupational Safety Act,[28] which "declared the policy of the State of Texas to protect the health and welfare of the people . . . by protecting working men and women against unsafe and hazardous working conditions and by encouraging correction of any such working conditions that may exist in industry and enterprise."[29] The Texas Legislature created the Occupational Safety Board for the purpose of administering the Act.[30] Section 3 of the Occupational Safety Act prescribes the duties of employers, Subdivision (a) provides :

> Every employer shall furnish and maintain employment and a place of employment reasonably safe and healthful for employees. Every employer shall install, maintain, and use such methods, processes, devices, and safeguards, including methods of sanitation and hygiene, as are reasonably necessary to protect the life, health, and safety of such employees, and shall do every other thing reasonably necessary to render safe such employment and place of employment.[31]

Subdivision (b) of section 3 enables the Occupational Safety Board to make rules in accordance with the policy of the Act.[32] In recent years the state legislature has failed to fund the Occupational

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Supp. 1971-1981); TEX. REV. CIV. STAT. ANN. art 5182a (Texas Occupational Safety Act) (Vernon 1971).

28. TEX. REV. CIV. STAT. ANN. art. 5182a (Vernon 1971).

29. *Id.* art. 5182a, § 1.

30. *Id.* art. 5182a, § 4.

31. *Id.* art. 5182a, § 3(a); *see* Cabrera v. Delta Brands, Inc., 538 S.W.2d 795, 797 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.). In *Cabrera v. Delta Brands, Inc.*, the only reported decision under the Occupational Safety Act, the Texarkana Court of Civil Appeals stated:

> It is a primary, continuing and non-delegable duty of the employer to provide a safe place and conditions in which his employees may work. . . . As a part of this obligation the employer must instruct his employees in the safe use and handling of the products and equipment used in and around the employer's plant or facilities. . . . One of the reasons for placing this burden on the employer is because the employer usually has greater knowledge or should have greater knowledge of the dangers and risks of injuries to the employee.

Cabrera v. Delta Brands, Inc., 538 S.W.2d 795, 797 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.).

32. *See also,* TEX. REV. CIV. STAT. ANN. art. 5182a § 8(a) (Vernon 1971). Section 3(b) states that the rules promulgated by the Occupational Safety Board are binding upon employes, whereas section 8 enables the Board to promulgate rules. *See id.* art. 5182a §§ 3(b), 8.

Safety Division. As a result, the regulations are rarely enforced.[33]

The Texas Legislature has also passed the Health, Safety and Morals Act.[34] This Act regulates the temperature and humidity,[35] odors and dust,[36] cleaning,[37] exits and handrails,[38] toilets,[39] and immoral influences[40] of the worksite. The Health, Safety and Morals Act enables the Commissioner of Labor Statistics or any one of his deputies to inspect the worksite, and upon finding a violation, issue a written order mandating the correction of the unsafe condition.[41] The failure to comply with the Commissioner's order may subject the employer to fines or imprisonment.[42] Although the Protection of Health, Safety and Morals Act is still in existence, its effectiveness has been largely superseded by the Occupational Safety and Health Act.[43]

In 1970, the United States Congress passed the Occupational Safety and Health Act[44] (OSHA), an extensive act designed to "as-

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33. Telephone interview with Marion Jones, Chief Safety Engineer of the Occupational Safety Division, Texas Health Department (May 21, 1980). Mr. Jones stated that while the Occupational Safety Act is still technically in effect, the state of Texas has provided no funds, and, therefore, the regulations are no longer enforced. The Occupational Safety Division, however, does receive federal funds from the Occupational Safety and Health Administration. With these funds the Occupational Safety Division advises employers within the state of Texas on applicable federal regulations. Mr. Jones stated that the federal government may, in prosecuting a safety violation, use a state standard, such as those promulgated under the Texas Occupational Safety Act.

34. TEX. REV. CIV. STAT. ANN. arts. 5173-80 (Vernon 1971).

35. *Id.* art. 5173.

36. *Id.* art. 5174.

37. *Id.* art. 5175.

38. *Id.* art. 5176.

39. *Id.* art. 5177.

40. *Id.* art. 5178.

41. *Id.* art. 5179.

42. *Id.* arts. 5178a, 5179a (Vernon Supp. 1979). These statutes provide that the employer may be fined not less than $25 nor more than $200 and/or sentenced to up to 60 days in jail. *See id.* arts. 5178a, 5179a. Compared to the available penalties under current federal law, it is easy to see why the state safety acts were not effective. *See* Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 444-45 (1977) (state statutory remedies inadequate to protect employee from death or injury).

43. *See* TEX. ATT'Y GEN. OP. NO. H-911 (1976) (to extent promulgated, OSHA supersedes arts. 7173 to 5180, 5182). Mr. Kosta stated that since 1976 no money has been funded for the enforcement of the Health, Safety and Morals Act. There are, however, certain areas (such as bathrooms in mines) which are not regulated by the federal government, and remain, technically within the jurisdiction of this Act. Telephone interview with Larry Kosta, Director of Labor Law Division, Texas Department of Labor and Standards (May 22, 1980).

44. 29 U.S.C. §§ 651-78 (1976).

sure so far as possible every working man and woman in the Nation safe and healthful working conditions."[45] Section 5 of the Act states that it is the duty of each employer to furnish "each of his employees employment and a place of employment which are free from recognized hazards which are likely to cause death or serious physical harm to his employees."[46] Section 6 of OSHA expressly enables the Secretary of Labor to promulgate standards with the intent to improve safety or health.[47] Under this authority, the Secretary of Labor has enacted several hundred regulations intended to assure that no person's life is needlessly put in risk of harm.[48]

OSHA, as well as its state predecessors, are prophylactic measures designed to prevent workplace injuries by assuring that the worksite is safe and healthy.[49] This is in contrast to worker's compensation statutes which are designed to compensate the employee for the injury which has already occurred.[50] Thus, from the common law right to a safe place to work there arose two statutory means for preserving that right, the prophylactic rights designed to prevent the injury, and the compensatory rights to relief upon injury. Within the first category, the prophylactic rights of the employee, there are two major areas of concern today: the employee's

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45. *See id.* § 651. The purpose of OSHA is clearly set out in section 651 of the Act. *See* Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230, 233 (5th Cir. 1974).

46. 29 U.S.C. § 654 (1976)(known as general duty clause); *see* Champlin Petroleum Co. v. Occupational Safety and Health Review Comm'n, 593 F.2d 637, 639 (5th Cir. 1979).

47. 29 U.S.C. § 655 (1976); 29 U.S.C. §§ 655, 657 (1976); *see* Bloomfield Mechanical Contr., Inc. v. Occupational Safety and Health Review Comm'n, 519 F.2d 1257, 1263 (3rd Cir. 1975); Florida Peach Growers Ass'n v. United States Dept. of Labor, 489 F.2d 120, 124 (5th Cir. 1974); the standards are presently listed in 29 C.F.R. §§ 1910-90 (1981).

48. *See* 29 C.F.R. §§ 1910, 1915, 1926, 1928 (1981).

49. *See* Whirlpool Corp. v. Marshall, 445 U.S. 1, 11-13 (1980); Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 444-45 (1977). The *Atlas* Court explained the purpose and need for OSHA as follows:

> After extensive investigation, Congress concluded, in 1970, that work-related deaths and injuries had become a drastic national problem. Finding the existing state statutory remedies as well as state common-law actions for negligence and wrongful death to be inadequate to protect the employee population from death and injury due to unsafe working conditions, Congress enacted the Occupational Safety and Health Act of 1970. . . . The Act created a new statutory duty to avoid maintaining unsafe or unhealthy working conditions, and empowers the Secretary of Labor to promulgate health and safety standards.

Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 444-45 (1977) (footnotes omitted).

50. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 275-355 (West 1972); N.Y. WORK. COMP. LAW §§ 1-402 (McKinneys 1965); TEX. REV. CIV. STAT. ANN. arts. 8306-09 (Vernon 1967).

right to have the worksite inspected[51] and the right of the employee to strike unsafe work areas.[52]

III. PROPHYLACTIC RIGHTS

A. *The Employee's Right To Have The Worksite Inspected*

The design of the OSHA is to prevent workplace injuries by assuring that the place of employment is free from recognized hazards likely to cause physical injury.[53] To this end, Congress passed section 8(a) of the Act which provides:

> In order to carry out the purpose of this Act, the Secretary [of Labor], upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—
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> (1) to enter without delay and at reasonable times any factory, plant establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
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> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.[54]

Section 8(f)(1) of the Act prescribes that any employee or his representative may petition the Secretary of Labor for the inspection of the worksite.[55] The petition must be in writing and must

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51. *See* 29 U.S.C. §§ 657(a), (f) (1976).

52. 29 C.F.R. § 1977.12(b)(2) (1981) (OSHA).

53. *See* 29 U.S.C. §§ 651, 654 (1976).

54. *Id.* § 657(a); *see* Marshall v. Barlow's, Inc., 436 U.S. 307, 309 n.1 (1978). In *Marshall v. Barlow's, Inc.*, the United States Supreme Court read section 8(a) of OSHA to require, in the absence of consent, a search warrant to inspect the employer's premises. The administrative search warrant may be issued upon a less stringent probable cause than the traditional warrant in a criminal action. Probable cause for an administrative search may be based upon specific evidence of a violation such as the notice of an employee under section 8(f), or by showing that the reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to the particular investigation. *See* Marshall v. Barlow's, Inc., 436 U.S. 307, 320-21 (1978); See v. Seattle, 387 U.S. 541, 543 (1967); Camara v. Municipal; *see also* 29 U.S.C. 657(a) (1976).

55. *See* 29 U.S.C. § 657(f)(1) (1976); *see also* Whirlpool Corp. v. Marshall, 445 U.S. 1, 9, (1980).

set forth reasonable grounds for the inspection.[56] Upon receiving a request for inspection predicated upon reasonable belief that an imminent danger is present in a workplace, OSHA mandates an inspection.[57] If the Secretary, however, determines that there are no reasonable grounds to believe that a violation exists, he must notify the employee in writing that his request for an inspection has been denied.[58]

In order to protect the employee's right to request the inspection of unsafe workareas, Congress passed section 11(c) of the Act.[59] This provision provides that no employee may be discharged or otherwise discriminated against because he has filed a complaint or otherwise exercised any right afforded under the Act.[60] Additionally, the names of employees who provide information[61] or who make complaints are protected from disclosure under the in-

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56. 29 U.S.C. § 657(f) (1) (1976).

57. Whirlpool Corp. v. Marshall, 445 U.S. 1, 9-10, (1980); 29 U.S.C. § 657(f)(1) (1976). It should be noted that the code provides: "If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he *shall* make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists," whereas the Supreme Court's interpretation of this provision states that the Secretary *must* make an inspection. 29 U.S.C. § 657(f) (1976) (emphasis added). *Compare* Whirlpool Corp. v. Marshall, 445 U.S. 1, 9-10, (1980) (must inspect) *with* 29 U.S.C. § 657(f)(1) (1976) (shall inspect).

58. 29 U.S.C. § 657(f)(1) (1976). If the request for inspection has been denied, the employees' rights appear to be limited to refiling a more detailed request, or in the most drastic situations, filing a complaint seeking a writ of mandamus compelling the Secretary to undertake an inspection. If the circumstances warrant, the employee may be justified in refusing to work in the hazardous workarea.

59. 29 U.S.C. § 660(c) (1976). *See* Whirlpool Corp. V. Marshall, 445 U.S. 1, 10 (1980); Stephenson Enter. v. Marshall, 578 F.2d 1021, 1025-26 (5th Cir. 1978); 29 U.S.C. § 660(c) (1976). Subsection (1) of section 11(c) states:

> No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or other of any right afforded by this chapter.

29 U.S.C. § 660(c)(1) (1976); *See* Whirlpool Corp. v. Marshall, 445 U.S. 1, 3 n.2 (1980).

60. *See* Whirlpool Corp. v. Marshall, 445 U.S. 1, 9 (1980); 29 U.S.C. § 660(c)(1) (1976).

61. Employees can provide information in two ways: first, by requesting inspection or otherwise giving notice prior to the inspection, *see* 29 U.S.C. § 657(f)(1) (1976); and secondly, by accompanying the inspector or otherwise talking to him during the inspection, *see id.* §§ 657(e), (f)(2). The employee is protected under the informer's privilege in either case. *See* Stephenson Enter. v. Marshall, 578 F.2d 1021, 1025 n.3 (5th Cir. 1978); *see also* 29 U.S.C. § 660(c)(1) (1976).

former's privilege.[62] During the course of the inspection, a representative of the employees is permitted to accompany the OSHA inspector.[63] Additionally, any employee, not merely the employee representative, is permitted to notify the inspector of any violation of the Act which he has reason to believe exists in such workplace.[64] Since the inspection must occur at reasonable times during working hours,[65] and a reasonable number of employees or an employee representative are to accompany the inspector upon his inspection,[66] it logically appears to be within the mandate of section 11(c)[67] that such employees are entitled to be compensated for the time spent on the inspection tour.[68]

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62. *See* Stephenson Enter. v. Marshall, 578 F.2d 1021, 1025-26 (5th Cir. 1978). The informer's privilege is a judicially constructed privilege to protect the anonymity of the informant. *See* Roviaro v. United States, 353 U.S. 52, 59 (1957). Although the privilege generally protects only the identity of the informant, where the contents of the communication may tend to reveal the informant's identity, the communication is likewise protected. *See id.* at 60.

63. *See* 29 U.S.C. § 657(e) (1976). This provision provides that both the employer and the employees are entitled to have a representative accompany the OSHA inspector during the physical inspection of the workplace. *See id.* In Accu-Namics, Inc. v. Occupational Safety and Health Commission, 515 F. 2d 828 (5th Cir. 1975), *cert. denied,* 425 U.S. 903 (1976), the Court of Appeals for Fifth Circuit held the failure of the OSHA Inspector to immediately identify himself and provide a walkaround opportunity to representatives of the employer and employees would not result in the exclusion of evidence obtained on such an inspection of the premises in the absence of a showing of prejudice. *See id.* at 833; *see also* Marshall v. Western Waterproofing Co., 560 F.2d 947, 951 (8th Cir. 1977); Chicago Bridge & Iron Co. v. Occupational Safety & Health Review Comm'n, 535 F.2d 371, 375-76 (7th Cir. 1976).

64. *See* 29 U.S.C. § 657(f)(2) (1976).

65. *See id.* §§ 657(a)(1), (2).

66. *See id.* § 657(e).

67. *Id.* § 660(c).

68. Section 11(c) of OSHA states no employee shall be discharged or otherwise discriminated against because of the exercise of any right afforded by the Act. 29 U.S.C. § 660(c) (1) (1976). *See* Whirlpool Corp. v. Marshall, 445 U.S. 1, 9 (1980). Since the employee has the right to accompany the OSHA inspector during the inspection which must occur during regular working hours, it appears to be inconsistent with the intent of the Act to deny the employee compensation while accompanying the inspector. *Compare* 29 U.S.C. §§ 657(a), (e) (1976)*with id.* §§ 651, 660(c)(1). Although most employers pay their employees for time spent by them in participating in walkaround inspections, some do not. *See* Leone v. Mobile Oil Co., 523 F.2d 1153, 1161 (D.C. Cir. 1975). In *Leone,* however, the Court of Appeals for the D.C. Circuit held that it is not mandatory for the employer to compensate for time spent on the inspection. This position, however, appears to be contrary to the mandate of section 11(c) (1) of the Act, since it tends to discriminate against employees who accompany the inspector.

In 1977, Congress passed the Federal Mine Safety and Health Act (MSHA), a companion act to OSHA. *See* 30 U.S.C. §§ 801-962 (Supp. III 1979). Section 813 of MSHA parallels

When an OSHA inspection reveals a violation of the Act,[69] the Secretary of Labor may issue a citation for the alleged violation, fix a reasonable time for the abatement of the dangerous condition, and propose a penalty.[70] The employer, however, may contest the citation and proposed penalty,[71] and should he do so, the effective date of the abatement order is postponed until the completion of all administrative proceedings.[72] Since these proceedings may include a hearing before an administrative judge and an appeal to the Occupational Safety and Health Review Commission,[73] the actual abatement of the hazard may be delayed for some time.[74] If, however, the inspection reveals that workplace conditions or practices are expected to cause death or bodily harm, the OSHA inspector must inform the affected employees and the employer of the danger.[75] The Secretary of Labor can then petition a federal court to enjoin or otherwise restrain the conditions or practices giving rise to the imminent danger.[76] If the Secretary of Labor declines to seek injunctive relief, an affected employee is given the right to compel the Secretary to act.[77] There may arise, however, the occasion where the administrative procedures of OSHA may not be swift enough to prevent the injuries; in such cases the affected employees may be able to invoke their self-help right to

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section 8 of OSHA. *Compare* 29 U.S.C. § 657 (1976) (OSHA inspections) *with* 30 U.S.C. § 813 (Supp. III 1979) (MSHA inspections). Section 813(f) of MSHA expressly states that the "representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection." 30 U.S.C. § 813(f) (Supp. III 1979). There appears to be no logical reason to make a distinction between OSHA and MSHA inspections with reference to the right of the accompanying employee to be paid.

69. *See* 29 U.S.C. § 654 (1976); 29 C.F.R. §§ 1910-90 (1981).

70. *See* Whirlpool Corp. v. Marshall, 445 U.S. 1, 9 n.11 (1980); 29 U.S.C. §§ 658(a), 659(a), 666 (1976).

71. *See* Whirlpool Corp. v. Marshall, 445 U.S. l, 9 n.11 (1980); 29 U.S.C. § 659(a), (c) (1976).

72. *See* Whirlpool Corp. v. Marshall, 445 U.S. l, 9 n.11 (1980); 29 U.S.C. §§ 659(b), 666(d) (1976).

73. *See* Whirlpool Corp. v. Marshall, 445 U.S. 1, 9 n.11 (1980); 29 U.S.C. §§ 659(c), 661(i) (1976).

74. *See* Usery v. Babcock & Wilcox Co., 424 F. Supp. 753, 758 (E.D. Mich. 1976).

75. *See* Whirlpool Corp. v. Marshall, 445 U.S. 1, 4 (1980); Usery v. Babcock & Wilcox Co., 424 F.Supp. 753, 758 (E.D. Mich. 1976); 29 U.S.C. § 662(c) (1976).

76. *See* Whirlpool Corp. v. Marshall, 445 U.S. 1, 4 (1980); Usery v. Babcock & Wilcox Co., 424 F.Supp. 753, 758 (E.D. Mich. 1976); 29 U.S.C. § 662(a) (1976).

77. *See* Whirlpool Corp. v. Marshall, 445 U.S. 1, 4 (1980); 29 U.S.C. § 662(d) (1976).

"strike" unsafe work areas.[78] This right becomes even more important as funds are cut reducing the inspection of industrial workareas.

B. *The Right Of The Employee to Strike Unsafe Workareas*

In *Whirlpool Corporation v. Marshall,*[79] the United States Supreme Court held an employee faced with the choice between not performing the assigned task or subjecting himself to injury or death arising from a hazardous condition at the workplace, the employee may not be discharged or discriminated against because of his refusal to perform the assigned task.[80] Although this right has been dubbed a right to "strike,"[81] the Labor Management Relations Act clearly explains that the avoidance of abnormally dangerous working conditions is not a strike.[82]

The right to avoid unsafe workareas arises from three separate legislative acts: the Labor Management Relations Act (LMRA),[83] the National Labor Relations Act (NLRA),[84] and OSHA.[85] To completely understand the scope of this right it is necessary to probe each act individually.

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78. *See* Whirlpool Corp. v. Marshall, 445 U.S. 1, 4 (1980); Usery v. Babcock & Wilcox Co., 424 F.Supp. 753, 757-58 (E.D. Mich. 1976); 29 C.F.R. § 1977.12(b)(2) (1981).

79. 445 U.S. 1, (1980).

80. *See id.* at 4; *accord, e.g.,* NLRB v. Washington Aluminum Co., 370 U.S. 9, 17 (1962); Jones v. Laughlin Steel Corp. v. United Mine Workers, 519 F.2d 1155, 1157-58 (3rd Cir. 1975); Clark Eng'g & Constr. Co. v. United Bd. of Carpenters and Joiners, 510 F.2d 1075, 1078-80 (6th Cir. 1975); *see, e.g.,* Usery v. Babcock & Wilcox Co., 424 F.Supp. 753, 757-58 (E.D. Mich. 1976); Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 385 (1974); 29 U.S.C. § 143 (1976); 29 C.F.R. § 1977.12(b)(2) (1981).

81. *See* Whirlpool Corp. v. Marshall, 445 U.S. 1, 4 (1980). The term "strike" comes from the Daniel's bill to OSHA, dubbed the "strike with pay provision." *See id.* at 16.

82. *See, e.g.,* Whirlpool Corp. v. Marshall, 445 U.S. 1, 17-18 n.29 (1980); Gateway Coal Co. V. United Mine Workers, 414 U.S. 368, 385 (1974); 29 U.S.C. § 143 (1976).

83. *See* 29 U.S.C. § 143 (1976).

84. *See id.* § 157.

85. *See id.* §§ 655, 657(g)(2); 29 C.F.R. § 1977.12(b)(2) (1981). More precisely, the provision enabling the employee to avoid hazardous workareas was promulgated by the Secretary of Labor (*see* 29 C.R.F. § 1977.12 (1981)), under his rule making authority expressly authorized by Congress in the Occupational Safety and Health Act of 1970 (29 U.S.C. §§ 655, 657(g)(2) (1976)). In Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980), the Supreme Court upheld this regulation as a proper exercise of the Secretary's authority under OSHA. *Id.* at 4. *See also* Usery v. Babcock & Wilcox Co., 424 F.Supp. 753, 755-57 (E.D. Mich. 1976).

1. Labor Management Relations Act

Section 502 of the LMRA provides in pertinent part that:

> Nothing in this Act . . . shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act . . . be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service without his consent; *nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike.*[86]

The right to walk-off the job site under section 502 requires that the action to be taken in "good faith" and because of "abnormally dangerous conditions."[87] The meaning of these terms, and thereby the right to avoid hazardous workareas, appears to depend upon whether a duty to arbitrate the safety issue can be found or implied in the labor contract.[88]

In *NLRB v. Knight Morley Corp.*,[89] the Sixth Circuit Court of Appeals adopted a subjective standard to determine whether the employees' acts were in good faith and whether the workplace was abnormally dangerous. In this case, members of the buffing department walked off the job due to improper repair of an exhaust fan.[90] The court held that the testimony from the buffers as to the physical conditions of the plant was competent, "[l]aymen may testify as to the physical conditions they have observed."[91] Based upon the employees' testimony, the court found the conditions inside the buffing room were abnormally dangerous.[92] Although the

86. 29 U.S.C. § 143 (1976) (emphasis added); *see* Clark Eng'g & Constr. Co. v. United Bd. of Carpenters and Joiners, 510 F.2d 1075, 1078 (6th Cir. 1975).

87. *See* Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 385-86 (1974); 29 U.S.C. § 143 (1976).

88. *Compare* Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 385-87 (1974) (good faith belief of dangerous conditions does not overcome duty to arbitrate) *with* Jones & Laughlin Steel Corp. v. United Mine Workers, 529 F.2d 1155, 1157-58 (3d Cir. 1975) (contract may exclude *Gateway* duty to arbitrate).

89. 252 F.2d 753 (6th Cir. 1957), *cert. denied*, 357 U.S. 927 (1958).

90. *See id.* at 756. The employees walked off due to their belief that the work conditions were unhealthy and in the face of the employer's contention that the conditions were normal. *See id.* at 756.

91. *See id.* at 758.

92. *See id.* at 758. The employees testified at the NLRB hearing that they believed that

Knight Morley court alluded to the good faith of the employees in walking out,[93] it appears that good faith was implied from the presence of abnormally dangerous conditions.[94]

The subjective test of "abnormally dangerous conditions" adopted by the *Knight Morley* court was laid to rest with the NLRB's *Redwing Carriers* decision.[95] In that case, the Board stated:

> We are of the opinion that the term [abnormally dangerous condition] contemplates, and is intended to insure, an objective, as opposed to a subjective, test. What controls is not the state of mind of the employee or employees concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered 'abnormally dangerous.'[96]

The objective standard of "abnormally dangerous conditions" has been applied in all section 502 cases since *Redwing Carriers* where the walk-off was otherwise prohibited by a no-strike provision of a labor contract.[97] This test was also expressly adopted by the United States Supreme Court in *Gateway Coal Co. v. United Mine Workers.*[98]

In the *Gateway* decision, the Supreme Court held that "a refusal to work because of good faith apprehension of physical danger is protected activity and not enjoinable, even where the employees have subscribed to a comprehensive no-strike clause in their labor

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continued work would be hazardous to their health due to the extreme heat and accumulation of dust. *Id.* at 756. Their testimony further established that the temperature of the buffing room was 110 degrees, the humidity level high, and that the improperly repaired exhaust fan failed to adequately remove dust. *Id.* at 756.

93. *See id.* at 756, 759.

94. *See id.* at 756-59. In Banyard v. NLRB, 505 F.2d 342 (D.C. Cir. 1974), the court expressly stated that the good faith belief of the employee can be found from "ascertainable, objective evidence" of hazardous work conditions. *See id.* at 348.

95. *See* Redwing Carriers, 130 N.L.R.B 1208, 1209 (1961), *aff'd sub nom.* Teamsters Local 79 v. NLRB, 325 F.2d 1011 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 905 (1964).

96. *Id.* at 1209; *accord* Gateway Coal Co. v. United Mine Workers 414 U.S. 368, 387 (1974); Jones & Laughlin Steel Corp. v. United Mine Workers, 519 F.2d 1155, 1157 (3d Cir. 1975).

97. *See* Stop & Shop, 161 NLRB 75, 76 n.3 (1966), *aff'd sub nom.* Machaby v. N.L.R.B, 377 F.2d 59 (1st Cir. 1967); *see also* NLRB v. Fruin-Colnan Constr. Co., 330 F.2d 885, 892 (8th Cir. 1964) (rejecting subjective test of *Knight-Morley*).

98. 414 U.S. 368, 385-87 (1974); *see* Jones & Laughlin Steel Corp. v. United Mine Workers, 519 F.2d 1155, 1157 (3d Cir. 1975).

contract."[99] The Court further stated that a work stoppage authorized by section 502 cannot be the basis for a damage award or *Boys Market* injunction.[100] The Court, however, found that an express or implied duty to arbitrate extended to safety issues in the absence of explicit contractual exclusion.[101] It was, therefore, concluded that in the face of a duty to arbitrate, the employees' good faith belief that an abnormally dangerous condition exists is not enough.[102] In order to walk off a worksite under section 502 there must be "ascertainable, objective evidence" supporting the "conclusion that an abnormally dangerous condition for work exists."[103]

The definition of "abnormally dangerous condition" has been refined through the years. In *Anaconda Aluminum,* the NLRB stated:

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99. Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 385 (1974); *see* Jones & Laughlin Steel Corp. v. United Mine Workers, 529 F.2d 1155, 1157 (3d Cir. 1975); 29 U.S.C. § 143 (1976).

100. Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 385 (1974). In Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970), the Supreme Court stated that a no-strike obligation, whether express or implied, is the quid pro quo to the employers agreement to arbitrate labor disputes. *Id.* at 248; Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 382 (1974); *see* Teamsters Local v. Lucas Flour Co., 369 U.S. 95 (1962) (extending *Boys Market* to implied undertakings not to strike). Thus, where there is a duty to arbitrate, whether expressed or implied, the courts may enjoin a pending strike and such injunction is referred to as a *Boys Market* injunction. *See* Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 380-82 (1974).

101. *See* Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 382 (1974). In the *Steelworkers* trilogy, the United States Supreme Court pronounced a presumption of arbitrability for labor disputes. *Id.* at 377; *see* United Steelworkers of America v. American Mfg. Co., 363 U.S. 364 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) (known as the *Steelworkers* trilogy). In *Gateway,* the Court extended that presumption to include the duty to arbitrate safety issues in the absence of express contractual exclusion. *See* Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 379, 382 (1974).

The *Gateway* Court, after finding a duty to arbitrate, then held that, unless otherwise exempted, a safety "strike" could be enjoined under *Boys Market. See id.* at 380-87. The Court reasoned that section 502 is a limited exception to a *Boys Market* injunction. *See id.* at 385. It was held, however, that an honest belief, no matter how unjustified, is not sufficient to invoke the protection of section 502. *Id.* at 386. A union intending to "strike" unsafe work conditions under section 502 must present "ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists." *Id.* at 387.

102. Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 386 (1974).

103. *Id.* at 387. The *Gateway* Court refused to permit the section 502 "strike" because the district court's injunction corrected the safety hazard by suspending the two foremen pending final arbitration. *See id.* at 387. The two foremen who were suspended constituted the safety hazard which was the basis of this suit. *See id.* at 371-73.

> Absent the emergence of new factors or circumstances which change the character of the danger, work which is recognized and accepted by employees as inherently dangerous does not become 'abnormally dangerous' merely because employee patience with prevailing conditions wears thin or their forbearance ceases.[104]

Thus a section 502 walk-out requires an increase in the risk of danger over that considered to be normal for the particular job.[105] Unlike OSHA or NLRA, the mere existence of hazardous condition may not be sufficient for an LMRA walk-out.[106] Rather, before the employees "strike" the unsafe workareas they should obtain objective evidence showing that the conditions are hazardous beyond the normal standard.[107] In the *Jones & Laughlin Steel Corp. v. United Mine Workers*,[108] the *Gateway* requirement of objective evidence of "abnormally dangerous conditions" was established by a violation of federal health and safety standards. The importance of this decision is that it serves as a reminder that OSHA and other health and safety violations may be used as objective evi-

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104. 197 N.L.R.B. 336, 344 (1972); *see also* N.L.R.B v. Fruin-Colnan Constr. Co., 320 F.2d 885, 891-92 (8th Cir. 1964); Combustion Eng'g, 224 N.L.R.B. 76 (1976); Curtis Mathes Mfg. Co., 145 N.L.R.B. 473, 474 (1963).

105. *See* Curtis Mathes Mfg. Co., 145 N.L.R.B. 473, 474 (1963).

106. *See id.* at 474. In *Curtis Mathes* the N.L.R.B. explained that the recurrent breakdown of the exhaust fan was the cause of the high dust content in the air impairing visibility and breathing as well as producing sore throats. *Id.* at 474. The Board, however, pointed out that the conditions were not so abnormally dangerous that the employees could walk-out, and that the "highly unpleasant" conditions occurred periodically when the fans shut down. *Id.* at 474. Thus, the conditions did not support a section 502 walk-out.

It is to be noted, however, that the recurrent breakdown of the fans and the continual acceptance of the work conditions would not be a defense to a walk-out under section 7 of NLRA or rule 1977.2(b)(2) of OSHA. *See, e.g.*, Whirlpool Corp. v. Marshall, 445 U.S. 1, 7-8 (1980) (OSHA) (rule 1977.12(b)(2) permits work stoppage upon reasonable belief that work conditions present imminent risk of death or serious injury); NLRB v. Washington Aluminum Co., 370 U.S. 9, 14 (1962) (NLRA) (section 7 protects the right of workers to act together to improve their working conditions); *see also* 29 C.F.R. § 1977.12(b)(2) (1981) (OSHA); 29 U.S.C. § 157 (1976) (section 7 of NLRA).

107. *See* Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 386-87 (1974) (ascertainable, objective evidence required); Anaconda Aluminum, 197 N.L.R.B. 336, 344 (1972) (character of danger must exceed the acceptable norm).

108. 519 F.2d 1155, (3d Cir. 1975). In this case, a district court injunction of the work stoppage was dissolved by the Third Circuit because the parties had contracted to allow a mine safety committee to determine if the area was unsafe. The appellate court noted that the action was not a "strike," but merely the removal of employees from the hazardous area of the mine. *Id.* at 1156 *Gateway* was distinguished because there was objective evidence of the dangerous condition, rather than the mere subjective reactions of the affected employees. *See id.* at 1156.

dence of the degree of danger.[109] Objective evidence has also been found where third parties have testified that the conditions were unsafe.[110] Likewise, in *Baynard v. NLRB*,[111] the court of appeals explained that *Gateway* does not require that the objective evidence establish that the work condition was unsafe in fact, but merely that the employee's belief that the worksite was unsafe be supported by "ascertainable, objective evidence."[112]

Additionally, section 502 of LMRA provides that the affected individual has the right to walk off the worksite;[113] it does not, however, expressly allow a boycott by the union.[114] The union can, under section 502, communicate to its workers that the workplace is unsafe, and thereby boycott the employer, when its purpose is to bring about the correction of such conditions.[115] Furthermore, in light of the *Washington Aluminum* decision[116] and section 7 of

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109. Additionally, Rule 803(8) of the Federal Rules of Evidence provides that records of public agencies are admissible despite the unavailability of the declarant. Fed. R. Evid. 803(8).

110. *See* Banyard v. NLRB, 505 F.2d 342, 344-45, 348 (D.C. Cir. 1974) (*Ferguson's* Case) (opinion of a second driver and independent mechanic); NLRB v. Knight Morley Corp., 251 F.2d 753, 758 (6th Cir. 1957), *cert. denied*, 357 U.S. 927 (1958) (testimony of industrial health expert). In *Ferguson v. NLRB*, the companion case to *Banyard*, the employee refused to drive a truck which he asserted was unsafe. *See* Banyard v. N.L.R.B., 505 F.2d 342, 344 (D.C. Cir. 1974). The employee "hailed" the opinion of a second driver who confirmed the danger of the vehicle. The employee then took the truck to a mechanic who informed him that the truck was unsafe and should not be driven. Subsequently, the employer sent out a safety supervisor and mechanic who indicated that the vehicle was safe. A Department of Transportation safety inspector also stated that he could find nothing wrong with the vehicle. *Id.* at 345. In affirming the employee's section 502 right to refuse to drive the truck, the court stated that *Gateway* did not require that the work condition be unsafe in fact, but merely that the employee's belief that the truck was unsafe be supported by "ascertainable, objective evidence." *Id.* at 348. The testimony of the second driver and the independent mechanic was sufficient objective evidence to justify the section 502 walk-off. *See id.* at 348.

111. 505 F.2d 342, 348 (D.C. Cir. 1974) (post-*Gateway* decision).

112. *See* Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 385-87 (1974).

113. Clark Eng'g & Constr. Co. v. United Bd. of Carpenters & Joiners, 510 F.2d 1075, 1079 (6th Cir. 1975); *see* 29 U.S.C. § 143 (1976).

114. Clark Eng'g & Constr. Co. v. United Bd. of Carpenters & Joiners, 510 F.2d 1075, 1079 (6th Cir. 1975); *see* Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 387 (1974) (section 502 did not deprive court of authority to enjoin strike).

115. Clark Eng'g & Constr. Co. v. United Bd. of Carpenters & Joiners, 510 F.2d 1075, 1084 (6th Cir. 1975) (McCree, J., concurring); *see* Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 385 (1974); Jones & Laughlin Steel Corp. v. United Mine Workers, 519 F.2d 1155, 1157-58 (3d Cir. 1975).

116. NLRB v. Washington Aluminum Co., 370 U.S. 9, 17 (1962).

NLRA,[117] employees, whether unionized or not, would have the right to use concerted activities to promote the correction of the unsafe work conditions.

In *NLRB v. Washington Aluminum Co.*,[118] the United States Supreme Court held that the employer violated section 8(a) (1) of the NLRA[119] by discharging seven employees who walked off the worksite due to extremely cold work temperatures. The significance of this decision is that the Court held that a walk-out due to health and safety conditions is a protected right under section 7 of the NLRA.[120] Additionally, the Supreme Court stated that section 7 does not require a specific demand to remedy the hazardous condition before the employees engage in their concerted activity; section 7 protects "concerted activity whether they take place before, after, or at the same time such a demand is made."[121] Thus, the

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117. 29 U.S.C. § 157 (1976). Section 7 of the National Labor Relations Act states in pertinent part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

118. 370 U.S. 9, 13 (1962).

119. 29 U.S.C. § 158(a)(1) (1976). This section provides "it shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 157 (1976). *See* N.L.R.B. v. Washington Aluminum Co., 370 U.S. 9, 13 (1962). Section 7, 29 U.S.C. § 157 (1976), provides that employees have the right to engage in concerted activity for the purpose of mutual aid or protection. N.L.R.B. v. Washington Aluminum Co., 370 U.S. 9, 13 (1962); 29 U.S.C. § 157 (1976).

120. *See* 29 U.S.C. § 157 (1976); *see also* NLRB v. Washington Aluminum Co., 370 U.S. 9, 17 (1962). In *Washington Aluminum*, seven employees walked off the worksite in protest of extremely cold work temperatures believing their action could persuade the employer to provide some heat. *Id.* at 12. The company's president decided to terminate the employees who walked out as an example of employee discipline. The N.L.R.B. found that the action of the workers was concerted activity to protest the company's failure to supply adequte heat, and that such activity was protected under section 7 of NLRA. *Id.* at 12. The N.L.R.B. ruled that the discharge of the employees was an 8(a) (1) violation and under section 10(c), 29 U.S.C. § 160(c) (1976), ordered that the employees be reinstated with backpay. NLRB v. Washington Aluminum Co., 370 U.S. 9, 13 (1962). The United States Supreme Court found that the Board properly interpreted and applied the Act to the circumstances of the case. *See id.* at 18.

121. *Id.* at 14 (1962). The employer contended that the employees lost their section 7 right because they walked off without affording the company an opportunity to avoid the work stoppage by correcting the work condition. *See id.* at 13. The Supreme Court, however, concluded that such a requirement would place an onerous restriction upon this right, and thereby concluded that section 7 does not require a specific demand prior to engaging in concerted activities. *See id.* at 14. In a post-*Washington Aluminum* decision the Court of Appeals for the Sixth Court ruled that the fact that the employer was presently undertaking

employees were entitled to reinstatement with back pay.[122]

Section 7 protects work stoppages directed toward the correction or improvement of work conditions.[123] Unlike section 502 of LMRA, section 7 of NLRA requires concerted activity;[124] the acts of an individual employee which are not shown to be for the mutual aid and protection of others are not protected under section 7.[125] The actions of employees not exposed to the conditions are, however, protected by section 7 when their purpose is for the aid and protection of other workers.[126] Section 7 does not require new and abnormally dangerous conditions;[127] under this section the employees may engage in concerted activities to ameliorate present

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action toward the correction of the conditions did not remove the section 7 right to "strike." *See* N.L.R.B. v. Elias Bros. Restaurants, 496 F.2d 1165, 1167 (6th Cir. 1974) (per curiam).

122. NLRB v. Washington Aluminum Co., 370 U.S. 9, 18 (1962); *see* 29 U.S.C. § 160(c) (1975). The discharge of the employees was an unfair labor practice in violation of section 8(a)(1) of NLRA. *See* N.L.R.B. v. Washington Aluminum Co., 370 U.S. 9, 13, 18 (1962); 29 U.S.C. § 158(a)(1) (1976). Section 8(a)(1) protects the employee's section 7 rights, including the right to "strike" for the improvement of work conditions. *See* N.L.R.B. v. Washington Aluminum Co., 370 U.S. 9, 13, 18 (1962); 29 U.S.C. § 158(a)(1) (1976). The penalty for section 8(a) (1) violation includes reinstatement with backpay. 29 U.S.C. § 160(c) (1976); *see* N.L.R.B. v. Washington Aluminum Co., 370 U.S. 9, 13 (1962).

123. *See, e.g.*, N.L.R.B. v. Washington Aluminum Co., 370 U.S. 9, 12-13, 18 (1962); N.L.R.B. v. Long Beach Youth Centers, Inc., 591 F.2d 1276, 1278 (9th Cir. 1979); NLRB v. Elias Bros. Restaurants, 496 F.2d 1165, 1167 (6th Cir. 1974) (per curiam).

124. *Compare* Clark Eng'g & Constr. Co. v. United Bd. of Carpenters & Joiners, 510 F.2d 1075, 1079 (6th Cir. 1975) (LMRA) (right of the individual) *with* NLRB v. C & I Air Conditioning, Inc., 468 F.2d 977, 978 (9th Cir. 1973) (NLRA) (section 7 does not protect individual activity performed for individual benefit).

125. *See* NLRB v. C & I Air Conditioning, Inc., 486 F.2d 977, 978 (9th Cir. 1973). In *C & I Air Conditioning*, the court found that the employee's complaints about unsafe work conditions were for his benefit only, and were not for the mutual aid or protection of other workers. *See id.* at 978. That court, as well as many others, found that the actions of one individual are protected under section 7 of NLRA if the evidence indicates that the employee's action was for the benefit of his co-workers. *See id.* at 978; NLRB v. Ben Perkin Corp., 452 F.2d 205, 206 (7th Cir. 1971); NLRB v. Interboro Constr., Inc., 388 F.2d 495, 500 (2d Cir. 1967).

126. *See* Morrison-Knudsen Co. v. NLRB, 359 F.2d 411, 413-14 (9th Cir. 1966).

127. *Compare* Curtis Mathes Mfg. Co., 145 NLRB 473, 474 (1963) (LMRA) (periodic unpleasant conditions insufficient for section 502) *and* Anaconda Aluminum, 197 NLRB 336, 344 (1972) (NLRA) (section 502 requires new factors which change risk of danger) *with* NLRB v. Washington Aluminum Co., 370 U.S. 9, 11, 12-13, 18 (1962) (NLRA) (protest of work conditions protected under § 7 where condition occurred from time to time). In fact, under section 7 it does not matter that the employer is presently undertaking efforts to improve or correct the work conditions. *See* NLRB v. Elias Bros. Restaurants, 496 F.2d 1165, 1167 (6th Cir. 1974) (per curiam).

and future conditions,[128] as well as those which are recurrent.[129]

The concerted activites of the employees in protest of working conditions may take many forms, including a strike.[130] The activities taken by the employees are protected by section 8(a)(1) of the NLRA.[131] Section 8(a)(1) provides that it is an "unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."[132] Sanctions for the employer's unfair labor practice include those measures necessary to make the employee whole, including reinstatement with back pay.[133]

2. Occupational Safety And Health Act

Pursuant to the Occupational Safety and Health Act, the Secretary of Labor in 1973 promulgated rule 1977.12.[134] In this rule, the Secretary explained that OSHA implies certain rights to the employee,[135] but that the Act does not "entitle employees to walk off the job because of potential unsafe work conditions at the workplace."[136] Rule 1977.12(b)(2) provides:

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128. *See* Bob's Casing Crews, Inc. v. NLRB, 458 F.2d 1301, 1303-04 (5th Cir. 1972).

129. *See* NLRB v. Washington Aluminum Co., 370 U.S. 9, 11, 12-13, 18 (1962).

130. *See, e.g.*, NLRB v. Long Beach Youth Center, Inc., 591 F.2d 1276, 1278 (9th Cir. 1979) (work stoppage); NLRB v. Elias Bros. Restaurant, 496 F.2d 1165, 1167 (6th Cir. 1974) (per curiam) (protests over working conditions and efforts to persuade other employees to walk out); United Packinghouse, Food & Allied Workers Int'l Union v. NLRB, 416 F.2d 1126, 1135 (D.C. Cir. 1969) (collective bargaining), *cert. denied*, 396 U.S. 903 (1969); First Nat'l Bank v. NLRB, 413 F.2d 921, 923 (8th Cir. 1969) (strike).

131. *See* NLRB v. Washington Aluminum Co., 370 U.S. 9, 13 (1962).

132. *See* 29 U.S.C. § 158(a)(1) (1976).

133. *See* NLRB v. Washington Aluminum Co., 370 U.S. 9, 13 (1962); 29 U.S.C. § 160(c) (1976).

134. 29 C.F.R. § 1977.12 (1981). The Secretary of Labor has rule making power under 29 U.S.C. §§ 655, 657(g)(2) (1976).

135. *See* Whirlpool Corp. v. Marshall, 445 U.S. 1, 4-5 n.3 (1980); 29 C.F.R. § 1977.12(a) (1981).

136. *See* Whirlpool Corp. v. Marshall, 445 U.S. 1, 4-5 n.3 (1980); 29 C.F.R. § 1977.12(b)(1) (1981). The employee does not, under OSHA, have the right to walk off the job, because the right to an inspection will normally correct the hazard. *See* 29 C.F.R. § 1977.12(b)(1) (1981). It is to be noted, however, that rule 1977.12(b)(1) does not supersede section 502 of LMRA or section 7 of NLRA; therefore, although the employee may not be entitled to walk off under OSHA, he may be under LMRA or NLRA. *See* Whirlpool Corp. v. Marshall, 445 U.S. 1, 17-18 n. 29 (1980). *Compare* 29 U.S.C. § 143 (1976) (LMRA) (right to avoid abnormally dangerous condition) *and id.* § 157 (NLRA) (right to use concerted activity to improve work conditions) *with* 29 C.F.R. § 1977.12(b)(1) (1981) (OSHA does not entitle employee to walk off job).

> [O]ccasions may arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses, in good faith, to expose himself to the dangerous condition, he would be protected against subsequent discrimination.[137]

In *Whirlpool Corp. v. Marshall*,[138] the United States Supreme Court held that rule 1977.12(b)(2) was properly "promulgated by the Secretary in the valid exercise of authority under the Act."[139] In upholding the rule, the Supreme Court stated:

> [C]ircumstances may sometimes exist in which the employee justifiably believes that the express statutory arrangement [of OSHA] does not sufficiently protect him from death or serious injury. Such circumstances will probably not often occur, but such a situtation may arise when (1) the employee is ordered by his employer to work under conditions that the employee reasonably believes pose an imminent risk of death or serious bodily injury, and (2) the employee has reason to believe that there is not sufficient time or opportunity either to seek effective redress from his employer or to apprise OSHA of the danger.[140]

The OSHA right to avoid unsafe work areas is more limited than its LMRA and NLRA counterparts.[141] First of all, the OSHA right

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137. 29 C.F.R. § 1977.12(b)(2) (1981); *see* Whirlpool Corp. v. Marshall, 445 U.S. 1, 4-5 n.3 (1980); Usery v. Babcock & Wilcox Co., 424 F.Supp. 753, 755 (E.D. Mich. 1976). Rule 1977.12(b)(2) continues:

> The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and have been unable to obtain, a correction of the dangerous condition.

29 C.F.R. § 1977.12(b)(2) (1981).

138. 445 U.S. 1 (1980).

139. Whirlpool Corp. v. Marshall, 445 U.S. 1, 22 (1980); *accord* Usery v. Babcock & Wilcox Co., 424 F.Supp. 753, 757 (E.D. Mich. 1976).

140. Whirlpool Corp. v. Marshall, 445 U.S. 1, 10-11 (1980); *see* 29 C.F.R. § 1977.12(b)(2) (1981).

141. *See* Usery v. Babcock & Wilcox Co., 424 F.Supp. 753, 757 (E.D. Mich. 1976). *Compare* 29 C.F.R. § 1977.12(b)(2) (1981) (OSHA) (employee can walk off job when conditions pose imminent risk of death or serious injury and regulatory system not swift enough to protect employee) *with* 29 U.S.C. § 143 (1976) (LMRA) (right to avoid abnormally dangerous condition) *and id.* § 157 (NLRA) (right to strike for improved work conditions).

exists only so long as the OSHA regulatory system is not able to properly protect the employee.[142] Once the OSHA inspector has arrived and determined that the risk of danger is not imminent, the employee cannot refuse to work under rule 1977.12(b)(2).[143] Additionally, in order to walk out under the OSHA rule the employee must reasonably believe that the work conditions pose an imminent threat of death or serious bodily injury.[144] LMRA and NLRA merely require that the work conditions be "abnormally dangerous"[145] and unsatisfactory,[146] respectively; unlike OSHA they do not require that the perceived danger be "imminent." An OSHA walk out also requires the employee, where possible, to seek the correction of the dangerous condition from his employer before he leaves the job.[147]

To understand rule 1977.12(b)(2), one must realize its purpose within the OSHA system. The OSHA right to walk off the workplace is not designed to promote workplace safety; OSHA achieves this goal through its regulatory and inspection process.[148] Rule 1977.12(b)(2), rather, is intended to assure the employee of his right to avoid unsafe work areas on those occasions when the OSHA regulatory system is ineffective in preserving the employee's health and safety.[149]

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142. *See* Whirlpool Corp. v. Marshall, 445 U.S. 1, 4-5 n.3 (1980); Usery v. Babcock & Wilcox Co., 424 F.Supp. 753, 757 (E.D. Mich. 1976). NLRA and LMRA right exist so long as the condition exists. *See* Clark Eng'g & Constr. Co. v. United Bd. of Carpenters & Joiners, 510 F.2d 1075, 1184 (McCree, J., concurring) (can boycott until condition corrected).

143. *See* Whirlpool Corp. v. Marshall, 445 U.S. 1, 9-10 (1980); Usery v. Babcock & Wilcox Co., 424 F.Supp. 753, 757-58 (E.D. Mich. 1976); 29 C.F.R. § 1977.12(b)(2) (1981). It is to be noted, however, that if the conditions are "abnormally dangerous" the employees may continue their work stoppage under section 502 of LMRA, (*see* notes 90-122 and accompanying text, *supra*); or the employees may continue their work stoppage under section 7 of NLRA when their purpose is to improve or correct the work conditions for their mutual aid or protection, (*see* notes 123-140 and accompanying text, *supra*).

144. *See* Whirlpool Corp. v. Marshall, 445 U.S. 1, 4-5 n.3 (1980); Usery v. Babcock & Wilcox Co., 424 F.Supp. 753, 755 (E.D. Mich. 1976); 29 C.F.R. § 1977.12(b)(2) (1981).

145. *See* Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 387 (1974).

146. *See* NLRB v. Washington Aluminum Co., 370 U.S. 9, 12-13, 18 (1962).

147. *See* Usery v. Babcock & Wilcox Co., 424 F.Supp. 753, 757-58 (E.D. Mich. 1976); 29 C.F.R. § 1977.12(b)(2) (1981).

148. *See* Usery v. Babcock & Wilcox Co., 424 F.Supp. 753, 757-58 (E.D. Mich. 1976); 29 C.F.R. § 1977.12(b)(2) (1981).

149. *See* Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980); Usery v. Babcock & Wilcox Co., 424 F.Supp. 753, 757-58 (E.D. Mich. 1976); 29 C.F.R. § 1977.12(b)(2) (1981).

3. The Right to "Strike For Pay"

A major question posed by the *Whirlpool* decision is whether the employee is entitled to be compensated while avoiding the unsafe work area.[150] The Supreme Court clearly explained that rule 1977.12(b)(2) does not expressly require employers to pay workers who refuse to perform imminently dangerous tasks.[151] The Court, however, recognized that the employee may not be discriminated against,[152] and left the issue of whether discrimination occurred when the employees were denied their pay to the lower courts.[153] Similarly, section 502 of LMRA does not expressly require the employer to pay the employee who avoids abnormally dangerous conditions.[154] Despite the absence of an express statement in these statutes, it appears that the employee would be entitled to compensation in most instances.[155]

Initially, a claim for wages is based upon the contract of employment.[156] Under general contract law, the performance of the requested service by the employee is a condition precedent to the employer's obligation to pay wages.[157] The employer, however, has the concurrent obligation to provide the employee with reasonably safe employment.[158] This obligation is a condition precedent to the employee's duty to perform the requested labor.[159] Therefore, since

150. *See* Whirlpool Corp. v. Marshall, 445 U.S. 1, 8-11 (1980). Of course, if the employee merely refuses to perform an assigned task, but does perform other services for the employer—such functions being out of the zone of danger—then the employee should be entitled to compensation for hours worked in accordance with the terms of the employment contract. *See* Burry v. National Trailer Convoy, Inc., 338 F.2d 422, 426 (6th Cir. 1964) (employer obligated to pay for all hours that he knowingly suffers or permits an employee to perform). For a further discussion on the right to be paid, *see* United Steelworkers of America v. Marshall, 647 F.2d 1189, 1233 n.69 (D.C. Cir. 1981), and Marshall v. N.L. Industries, Inc., 618 F.2d 1220, 1224 (7th Cir. 1980).

151. *See* Whirlpool Corp. v. Marshall, 445 U.S. 1, 19 (1980).

152. *See id.* at 19; 29 U.S.C. § 660(c) (1976); 29 C.F.R. § 1977.12(b)(2) (1981).

153. *See* Whirlpool Corp. v. Marshall, 445 U.S. 1, 19 n.31 (1980).

154. *See* 29 U.S.C. § 143 (1976).

155. *See* Marshall v. N.L. Indus., 618 F.2d 1220, 1224 (7th Cir.).

156. *See* Jernigan v. Lay Barge Delta Five, 296 F.Supp. 127, 129 (S.D. Tex. 1969), *aff'd*, 423 F.2d 1327 (5th Cir. 1970) (duty to pay wages arises from employee-employer relationship); Pioneer Casualty Co. v. Bush, 457 S.W.2d 165, 169 (Tex. Civ. App.—Tyler 1970, writ ref'd n.r.e.) (employer-employee relationship is embodied in contract).

157. *See* L. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS 322-23 (2d ed. 1965).

158. Farley v. MM Cattle Co., 529 S.W.2d 751, 754 (Tex. 1975); *see* Hough v. Railway Co., 100 U.S. 213, 217 (1879).

159. Rule 1977.12(b) (2) of OSHA and section 502 of LMRA provide that the employee

the employer's own acts—the failure to provide reasonably safe employment—prevents the employees from working, the employees are entitled to their expected compensation while awaiting the correction of the work conditions.[160]

Secondly, with respect to an OSHA authorized work stoppage, both section 11(c) and rule 1977.12(b)(2) provide that the employee may not be discriminated against.[161] A complaint of discrimination must be filed with the Secretary of Labor within thirty days from when the employee was discharged or otherwise discriminated against.[162] Complaints filed after the thirty days are generally considered stale; where strong extenuating circumstances exist, however, the thirty day period may be tolled in order to allow the Secretary to process the complaint.[163] Once the complaint is filed, the Secretary must notify the employee whether his section 11(c) rights have been violated.[164] If the Secretary believes that grounds for a violation exist, he may seek an award of back pay as an equi-

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has the right to avoid unsafe work areas. *See* Whirlpool Corp. v. Marshall, 445 U.S. 1, 11 (1980); Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 385 (1974); *see also* NLRB v. Washington Aluminum Co., 370 U.S. 9, 13, 18 (1962) (NLRA) (avoiding unsafe and unhealthy workareas is a protected right of the employee under section 7). At common law, the employer has the duty to provide reasonably safe workareas. *See* Hough v. Railway Co., 100 U.S. 213, 217 (1879); Farley v. M M Cattle Co., 529 S.W.2d 751, 754 (Tex. 1975). Since *Whirlpool, Gateway,* and *Washington Aluminum* hold that the employee does not have to work in an unsafe work environment, the presence of safe and healthy work conditions is a condition precedent to the obligation of the employees to perform their work services. *See* L. SIMPSON, HANDBOOK OF THE LAW OF CONTRACTS 300-01, 321-22 (2d ed. 1965). Where the terms of a contract for an agreed exchange are to be rendered at different times, the performance which is to come first in time is a constructive condition precedent to the duty of the other party to perform later. *Id.* at 300-01, 321-22.

160. The employee is entitled to damages produced by the employer's breach of the duty to provide safe employment; such damages are the amount expected to be earned from the contract, which should be the employee's expected wages. *See* Young v. Watson, 140 S.W. 840, 843 (Tex. Civ. App.—Galveston 1911, writ ref'd); *see also* United States *ex rel.* R.F. Lee Elec. Co. v. Stack, 308 F.Supp. 45, 51 (E.D. Va. 1968), *aff'd,* 420 F.2d 698 (4th Cir. 1970) (per curiam) (party prevented from performing a contract is entitled to recover damages for breach); Davis Bumper to Bumper v. American Petrofina Co., 420 S.W.2d 145, 151 (Tex. Civ. App.—Amarillo 1967, writ ref'd n.r.e.) (employer cannot breach contract, thereby rendering performance impossible, and then escape liability).

161. *See* Whirlpool Corp. v. Marshall, 445 U.S. 1, 11 (1980); 29 U.S.C. § 660(c) (1976); 29 C.F.R. § 1977.12(b)(2) (1976).

162. *See* 29 U.S.C. § 660(c)(2) (1976).

163. *See* Usery v. Northern Tank Line, Inc., No. CV-76-41-BLG (D. Mont. 1976) (waited 90 days before filing complaint because work position was seasonal); 29 C.F.R. § 1977.15(d)(3) (1981).

164. *See* 29 U.S.C. § 660(c)(3) (1981).

table remedy to the violation.[165] In this respect, it appears that if the employer is willing to pay the employee while working under the hazardous conditions, it would be discriminatory not to pay those employees who are ready, willing, and able to do work but for the unsafe working conditions.[166]

Additionally, the discharge or discrimination of an employee exercising his right to avoid unsafe workareas is an unfair labor practice in violation of section 8(a)(1) of NLRA.[167] It is well settled that employees "striking" unfair labor practices are entitled to back pay.[168] It is further established that where a causal responsibility for the employee's loss can be linked to the employer, the employer will be assessed the obligation to pay the back pay.[169] Therefore, when the employer has endangered his employees' safety and health by providing unsafe areas for the performance of assigned tasks, the employees are entitled to pay while exercising the right to protect their lives.

Although at first glance requiring the payment of wages to nonworking employees may seem harsh, the rule is necessary for the protection of employee health and safety. Without such a provision, the employer could coerce the employee to work in unsafe conditions due to economic necessity,[170] thus placing each employee in the position of potential death or injury. It must be remembered that the employee does not give up his right to safety and health by accepting a position of employment. The employer,

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165. *See* Marshall v. N.L. Indus. 618 F.2d 1220, 1224 (7th Cir. 1980); Dunlop v. Hanover Shoe Farms, 441 F.Supp. 385, 388 (M.D. Pa. 1976).

166. *See* 29 U.S.C. § 660(c)(1) (1976). For other labor actions dealing with discrimination, see NLRB v. Great Dane Trailers, 388 U.S. 26, 32-33 (1967) (company's failure to pay benefits to strikers is discrimination in simplest form); Allied Indus. Workers v. NLRB, 476 F.2d 868, 877 (D.C. Cir. 1973) (practice applied uniformly to all employees may be discriminatory); NLRB v. American Bakery & Confectionary Workers Union, 339 F.2d 324, 327 (2d Cir. 1964) (discrimination occurred when distinction arbitrarily made without sound basis which worked to employee's detriment).

167. *See* NLRB v. Washington Aluminum Co., 370 U.S. 9, 12-13 (1962); 29 U.S.C. §§ 157, 158 (1976). The ability to walk off unsafe work areas is a right protected by section 7 of NLRA, 29 U.S.C. § 157 (1976); *see* NLRB v. Washington Aluminum Co., 370 U.S. 9, 12-13 (1962).

168. *See* NLRB v. International Van Lines, 409 U.S. 48, 50-51 (1972); 29 U.S.C. § 160(c) (1976); *see also* NLRB v. Washington Aluminum Co., 370 U.S. 9, 13 (1962) (employees reinstated with backpay).

169. *See* NLRB v. United Marine Div., 417 F.2d 865, 868 (2d Cir. 1969), *cert. denied*, 397 U.S. 1008 (1970).

170. This would be an unfair labor practice in itself. *See* 29 U.S.C. § 158(a)(1) (1976).

rather, assumes the duty of protecting his employees from unreasonable risks of injury by providing a reasonably safe work place.[171] The employee should not be compelled to wait until he is injured before he is able to hold the employer to his duty to provide reasonably safe employment. The employer should not be able to benefit from his wrong at the potential cost of the employee.[172] Thus, if the prophylactic rights are to serve their function, they must give the employee a viable choice to avoid the hazardous work conditons.

III. COMPENSATION RIGHTS

A. *The Common Law And Statutory Right To Compensation For Workplace Injuries*

Despite the presence of prophylactic measures, working conditions continue to be unsafe and employees are often injured.[173] As previously discussed, when the employee's injury can be traced to the employer's negligence in failing to provide a safe place to work, the employer is liable to the employee.[174] For years, however, the courts have refused to recognize the rights of the employees and have denied their recovery by means of the "unholy trinity" of common law defenses—assumption of the risk, contributory negligence, and the fellow servant rule.[175] In an attempt to remove

171. *See* Hough v. Railway Co., 100 U.S. 213, 217 (1879); Farley v. M M Cattle Co., 529 S.W.2d 751, 752 (Tex. 1975); Leadon v. Kimbrough Bros. Lumber Co., 484 S.W.2d 567, 568 (Tex. 1972).

172. *See* Davis Bumper to Bumper v. American Petrofina Co., 420 S.W.2d 145, 151 (Tex. Civ. App.—Amarillo 1967, writ ref'd n.r.e.).

173. "[A]ny place where an accident occurs is not a safe place to work at that instant." Gonzales v. Lubbock State School, 487 S.W.2d 815, 817 (Tex. Civ. App.—Amarillo 1972, no writ). It is estimated that 7,000,000 Americans are injured each year in industrial accidents. Keeton, *Products Liability—Design Hazards and the Meaning of Defect*, 10 CUM. L. REV. 293, 293 n.1 (1979).

174. *See, e.g.*, Farley v. M M Cattle Co., 529 S.W.2d 751, 754-57 (Tex. 1975); Leadon v. Kimbrough Bros. Lumber Co., 484 S.W.2d 567, 569 (Tex. 1972); W. Prosser, HANDBOOK OF THE LAW OF TORTS 526 (4th ed. 1971.)

175. *See* Boggs v. Blue Diamond Coal Co., 590 F.2d 655, 658 (6th Cir. 1979), *cert. denied*, 444 U.S. 836 (1980); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 526-27 (4th ed. 1971); Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 223-25 (1952). The "unholy trinity" of defenses were not developed and applied to workmen's injuries until the last half of the 19th century. Thus they are relatively new and not firmly entrenched in the common law. *See* Boggs v. Blue Diamond Coal Co., 590 F.2d 655, 658 (6th Cir. 1979), *cert. denied*, 444 U.S. 836 (1980); W. PROSSER, HANDBOOK OF THE LAW

these defenses and to allow the employee compensation for his injury, most state legislatures passed statutory measures[176] which have evolved into the worker's compensation laws of today.[177] In this section we shall explore the second phase of workplace safety; the employee's right to compensation for his injuries. In particular, we shall analyze the intent and purpose of worker's compensation legislation and its effectiveness, or lack thereof, in modern society.

1. Worker's Compensation

Although the common law afforded the employee the right to a safe place to work and the right to compensation for any injury resulting from the employer's negligence, most workplace injuries remained uncompensated.[178] An understanding of the effectiveness of the common law cause of action can be seen from a classification of the causes or fault of workplace injuries revealed in a 1907 German study.[179] The study revealed the total number of accidents were caused in the following manner in the indicated percentages: 1) negligence or fault of the employer, 16.81%; 2) joint negligence of the employer and the injured employee, 4.66%; 3) negligence of a fellow servant, 5.28%; 4) acts of God, 2.31%; 5) fault or negligence of the injured employee, 28.89%; and 6) inevitable accidents connected with employment, 42.05%.[180] Using these figures,[181] it is

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OF TORTS 527-29 (4th ed. 1971).

176. *See* Boggs v. Blue Diamond Coal Co., 590 F.2d 655, 658-59 (6th Cir. 1979), *cert. denied*, 444 U.S. 836 (1980); Matthews v. University of Texas, 295 S.W.2d 270, 272 (Tex. Civ. App.—Waco 1956, no writ); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 530 (4th ed. 1971); Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 206 (1952).

177. *See* Hough v. Railway Co., 100 U.S. 213, 217 (1879); Farley v. M M Cattle Co., 529 S.W.2d 751, 754-57 (Tex. 1975); Leadon v. Kimbrough Bros. Lumber Co., 484 S.W.2d 567, 569 (Tex. 1972); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 526-27 (4th ed. 1971).

178. *See* Boggs v. Blue Diamond Coal Co., 590 F.2d 655, 658-59 (6th Cir. 1979), *cert. denied*, 444 U.S. 836 (1980); Lumbermen's Reciprocal Ass'n v. Behnken, 226 S.W. 154, 156 (Tex. Civ. App.—Galveston 1920), *aff'd*, 112 Tex. 103, 246 S.W. 72 (Tex. 1922); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 530 (4th ed. 1971); Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 224-25 (1952).

179. *See* Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 224-25 (1952).

180. *Id.* at 224.

181. The authors do not believe that these figures accurately represent the breakdown for fault for present day workplace injuries. With the rise of products liability law, many accidents previously categorized as inevitable are compensable under strict tort liability or warranty. *Cf.* RESTATEMENT (SECOND) OF TORTS §§ 402A, 402B (1965) (strict tort liability);

apparent that the employee was remediless in over 83% of all injuries.[182] The common law defense of contributory negligence would bar all causes represented by category number 2,[183] the fellow servant rule would prevent recovery in category number 3,[184] and recovery for categories 4, 5 and 6 would be denied due to the employee's inability to establish that the employer was negligent.[185] Thus, the employee would only be able to recover 16.8% of the time,[186] and those recoveries were often denied by overzealous courts which found that the employee voluntarily assumed the risk of injury by continuing to work in spite of the dangers created by his employer.[187] Under the common law system, therefore, the burden of injury was placed upon the employee, who was least able to afford it.[188]

The ineffectiveness of the common law system was established in courts which were reluctant to grant recoveries to the uninfluential, employee against his prominent, businessman employer. This position was epitomized in the pre-compensation law philosophy that the industrial enterprise could best be encouraged by making the burdens on industry as light as possible.[189] The courts effectu-

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U.C.C. §§ 2-313, -314, -315 (warranty). The authors merely use these figures as a breakdown of fault as recognized under the law as existing in the early 20th century.

182. Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 225 (1952); *see also* Boggs v. Blue Diamond Coal Co., 590 F.2d 655, 658-59 (6th Cir. 1979), *cert. denied*, 444 U.S. 836 (1980) (recovery had in less than 25% of all work accidents); Lumbermen's Reciprocal Ass'n v. Behnken, 226 S.W. 154, 156 (Tex. Civ.App.—Galveston 1920), *aff'd*, 112 Tex. 103, 246 S.W. 72 (1922) (employee remediless in 80% of all injuries). *See generally*, W. PROSSER, HANDBOOK OF THE LAW OF TORTS 530 (4th ed. 1971).

183. *See, e.g.*, Anderson v. St. Louis Southwestern. Ry. Co., 134 S.W. 1175, 1176-77 (Tex. 1911); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 527 (4th ed. 1971); Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 224 (1952).

184. *See, e.g.*, Armour v. Hahn, 111 U.S. 313, 319 (1884); Hough v. Railway Co., 100 U.S. 213, 215-16 (1879); Cactus Drilling Co. v. Williams, 525 S.W.2d 902, 910 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e); *see also* Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 223-24 (1952).

185. *See, e.g.*, Armour v. Hahn, 111 U.S. 313, 318 (1884); J. Weingarten, Inc. v. Sandefer, 490 S.W. 2d 941, 944 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.); Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 224-25 (1952).

186. *See* Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 225 (1952).

187. *Id. at 225; see* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 527-28 (4th ed. 1971).

188. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 530 (4th ed. 1971).

189. *See* Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL

ated this prejudice through the "unholy trinity" of common law defenses.[190]

The common law system also required the injured employee to go to court, which meant delay as well as heavy attorney's fees and other costs.[191] Thus, when the employee was fortunate enough to obtain a recovery, he actually took home a small part of the money paid.[192] Additionally, the resulting delay and need for money to meet everyday living expenses pressured the employee to settle his claim for much less than it was worth.[193] As a result, there was very little incentive for the employer to improve the working conditions.[194]

Commencing in 1910, most of the states enacted worker's compensation insurance.[195] The expressed theory behind this legislation was that "the cost of the product should bear the blood of the workman."[196] In actuality, the statutes were designed as an attempt to ensure that the injured employee received sufficient income and medical care to keep him from destitution.[197] Arthur Larson, a renowned author in the field of worker's compensation, explained the philosophy of compensation statutes in the following manner:

> Suppose claimant has worked for ten years at a drill press, at a salary which is not calculated to enable him to accumulate private annuities to care for him if he should have to stop working. The rules require him to wear a safety harness, and, although it is a hot and uncomfortable appliance, he has worn it faithfully until the day of injury, when in a moment of carelessness, he operates the machine without the harness and crushes both hands.
>
> A system of law based in any degree on individual merit at the instant of the accident can see only one result: nonliability. The em-

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L.Q. 206, 223 (1952).

190. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 526-30 (4th ed. 1971); Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 223-25 (1952).

191. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 530 (4th ed. 1971).

192. *Id. at 530.*

193. *Id. at 530.*

194. *See id. at 530.*

195. *See id. at 530;* Riesenfeld, *Contemporary Trends in Compensation for Industrial Accidents Here and Abroad*, 42 CALIF. L. REV. 532, 533 (1954).

196. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 530 (4th ed. 1971).

197. *See* Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 HARV. L. REV. 328, 333 (1912); Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 209-10 (1952).

> ployee not only was negligent, but violated a safety rule. The employer, on the other hand, has thoughtfully provided a safety device and had done all he could by enforcing the rule requiring its use. To require the innocent employer to pay the "guilty" employee might seem to flout the entire moral basis of law. In an entirely individualistic moral code, this might be so, but let us see what happens when considerations of social morality are introduced.
>
> The society surrounding the disabled man can do one of three things:
>
> First, it can refuse all aid, and let him starve in the street, or let him squat on the sidewalk with a few pencils and beg for pennies from those who were yesterday his equals.
>
> . . .
>
> Second, it can put him on county relief, or some other form of direct handout. This, while better than the first, is a poor solution in at least two ways: it stigmatizes the man as a pauper, and it places the cost on the political and geographical area where he happens to have his residence, although that subdivision had no connection with the injury.
>
> Third, it can grant him Worker's Compensation, thus preserving his dignity and self-respect as an injured veteran of industry, which is psychologically and morally the best of the three solutions, and placing the cost where it rightly belongs, on the consumers of the product whose production was the occasion of the injury.[198]

The workers' compensation statutes, therefore, are systems providing assistance to the injured employee at the cost of the consuming public.[199]

Workers' compensation does not rest upon the notion of fault, but is a compromise between tort law and social insurance.[200] Generally speaking, workers' compensation covers employees: who are employed in non-exempt or designated employments against harm which can be classified as either personal injury by accident, sustained in connection with such employment, or occupational disease (as defined by the controlling statute) contracted in such em-

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198. Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 209-10 (1952).

199. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 531 (4th ed. 1971); Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 210 (1952).

200. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 525 (4th ed. 1971). *See generally*, Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 207-21 (1952) (comparing tort and social justice principles to workmen's compensation).

ployment, resulting in disability or death.[201] The primary issue in a workers' compensation action is whether the injury arose from and in the course of employment.[202] Thus, under workers' compensation legislation, the employee is entitled to compensation when he can show a compensable injury resulting from his employment.[203]

The workers' compensation statutes shift the cost of injury from the employee to the employer (and ultimately to the consumer of the particular product) by means of insurance,[204] since the covered employer is generally required, either directly or indirectly, to obtain compensation insurance.[205] The cost of the insurance is then passed on to the consumer just as if it were raw materials or some other component of the product.[206] Money collected from various subscribers of the insurance is pooled by the carrier to compensate covered, injured employees.[207] The more hazards the particular employment and particular employer experience, the higher the rate the employer pays for the compensation insurance.[208] Thus, through sheer economics or through indirect pressure by the insurance carrier, the employer may be induced to correct defective and dangerous work conditions.[209]

In the order for the employee to recover in a workers' compensation action, he must establish that he has received a compensable injury during the course of his employment.[210] The employee does

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201. *See* Riesenfeld, *Contemporary Trends in Compensation for Industrial Accidents Here and Abroad*, 42 CALIF. L. REV. 531, 536 (1954).

202. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 531 (4th ed. 1971); *see* Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 HARV. L. REV. 328, 329 (1912); Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 208 (1952).

203. *See* W. PROSSER, HANDOOK OF THE LAW OF TORTS 531 (4th ed. 1971); Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 208 (1952).

204. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 531 (4th ed. 1971).

205. *See id.;* Riesenfeld, *Contemporary Trends in Compensation for Industrial Accidents Here and Abroad*, 42 CALIF. L.REV. 531, 534, 560 (1954).

206. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 531 (4th ed. 1971).

207. *Cf.* Riesenfeld, *Contemporary Trends in Compensation for Industrial Accidents Here and Abroad*, 42 CALIF L. REV. 531, 558-59 (1954) (carrier assumes the risk that losses may exceed income from policies).

208. *See* Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 215, 218 (1952).

209. *See* Riesenfeld, *Contemporary Trends in Compensation for Industrial Accidents Here and Abroad*, 42 CALIF. L. REV. 531, 555 (1954) (workmen's compensation designed to enhance industrial safety).

210. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 531 (4th ed. 1971); Larson, *The*

not have to establish that the employer was at fault,[211] nor are the common law defenses of contributory negligence, assumption of the risk, or the fellow servant rule a bar to his recovery.[212] Additionally, the statutory framework has attempted to eliminate the lengthy delays of common law litigation by establishing an administrative body to administer workers' compensation claims.[213]

2. Attacking The Citadel—Workers' Compensation Today

Workers' compensation statutes are not totally a samaritan act of the legislature. The acts are, in fact, compromised legislation wherein the employer gave up the common law defenses in exchange for the limitation of recovery by the employee.[214] Under workers' compensation statutes the amount of compensation to which the employee is entitled is statutorily fixed according to the nature and degree of the injury.[215] Generally, the injured employee is entitled to recover his medical expenses and a percentage of his lost income, but is allowed no recovery for pain and suffering, or disfigurement.[216] Additionally, when an employee is found to be covered by the workers' compensation act he is entitled to his limited statutory recovery; any potential common law recovery is barred.[217]

Although workers' compensation statutes have served a great legal and social function,[218] the system lacks the element of justice

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Nature and Origins of Workmen's Compensation, 37 CORNELL L.Q. 206, 208 (1952); Riesenfeld, *Contemporary Trends in Compensation for Industrial Accidents Here and Abroad*, 42 CALIF. L. REV. 531, 541-55 (1954).

211. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 531 (4th ed. 1971); Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 208 (1952).

212. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 531 (4th ed. 1971); *see* New York Central R.R. Co. v. White, 243 U.S. 188, 196-201 (1917)

213. Larson, *The Nature and Origins of Worker's Compensation*, 37 CORNELL L.Q. 206, 206 (1952).

214. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 531 (4th ed. 1971); *see* New York central R.R. Co. v. White, 243 U.S. 188, 201 (1917).

215. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 531 (4th ed. 1971); Riesenfeld, *Contemporary Trends in Compensation for Industrial Accidents Here and Abroad*, 42 CALIF. L. REV. 531, 553-55 (1954).

216. *See* Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 213-14 (1952); Riesenfeld, *Contemporary Trends in Compensation for Industrial Accidents Here and Abroad*, 42 CALIF. L. REV. 531, 555-57 (1954).

217. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 531 (4th ed. 1971); Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 206 (1952).

218. *See generally*, Larson, *The Nature and Origins of Workmen's Compensation*, 37

for the employee injured at the hands of his employer. As cogently explained by Arthur Larson, workers' compensation statutes are designed to, and do to a certain degree, serve a social function by providing the injured employee with sufficient income and medical care to keep him from destitution.[219] The statues, however, are not designed to compensate the employee for his injury, but merely to provide him with the bare minimum of income and medical care to keep him from being a burden to others.[220] The argument against compensation payments which equal the actual loss is that such an arrangement would "encourage malingering and trumped-up claims."[221] In this respect, however, it must be remembered that worker's compensation is not a division of tort law, but is a compromise between tort principles and social insurance.[222]

When one takes the "guilty" employee-innocent employer example used by Arthur Larson to explain the philosophy of worker's compensation, it is easy to understand the act's principles and form of social justice.[223] The utility of this analysis and the worker's compensation system is lost, however, in those 16.81% of the cases where the injury is the result of the employer's negligence.[224] The common law has always been characterized by its adaptability; its ability to provide new remedies to meet the changing conditions of our time.[225] In part, workers' compensation legislation has done this by providing a remedy to the injured employee where the prior common law system had failed.[226] In the process, however, the legislation has thrown the baby out with the

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CORNELL L.Q. 206, 209-10 (1952) (social justice performed by assuring each injured employee enough income and medical care to keep him from destitution); Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 HARV. L. REV. 328, 333 (1912) (statutes protect workmen and their dependents from social and economic degradation).

219. Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 209-10, 213 (1952); *accord* Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 Harv. L. Rev. 328, 333 (1912).

220. Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 213 (1952).

221. *Id.* at 214.

222. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 525 (4th ed. 1971). *See generally* Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206 (1952).

223. *See* Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 209-10 (1952).

224. *See id.* at 224.

225. *See id.* at 223.

226. *See id.* at 223.

bathwater[227] by limiting the recovery of those employees who had a remedy at common law.[228] Under the present system, those employees who are capable of establishing a common law claim against their employer, and thereby entitled to compensation for their full loss, are limited to the scant workers' compensation recovery.[229] This result is not only unjust, but also unnecessary to the effectuation of the workers' compensation system.

The compensation statutes were not designed to remove or replace the common law remedies.[230] The common law remedy was based upon fault; it required the employee to establish that his employer was negligent and that such negligence was a proximate cause of his injury.[231] Although workers' compensation did not require fault, it was reasoned that "where the employer has personally been guilty of a deliberate failure to provide adequately for the safety of his work-people, he should be liable to make an enhanced compensation, or the employee's right to sue for all his loss at common law should be preserved."[232] The rule that the employer should be fully accountable[233] for his negligence is based upon the reasonable belief that it would reduce the commission of such faults and thus reduce the number of workplace injuries.[234] Addi-

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227. The states have precluded the common law cause of action with the enactment of workmen's compensation acts. New York Central R.R. Co. v. White, 243 U.S. 188, 201 (1917) (statute sets aside one body of rules and establishes another in its place); *see, e.g.*, CAL. LAB. CODE § 3202 (West); LA. REV. STAT. ANN. § 23:1032 (West Supp. 1982); TEX. REV. CIV. STAT. ANN. art. 8306 § 3 (Vernon 1967).

228. The recovery under worker's compensation is much less than presently can be recovered at common law. For example, in Petro-Weld, Inc. v. Luke, 619 F.2d 418, 419 (5th Cir. 1980), the injured employee received a mere $19,225.18 in compensation for an injury valued at $400,000.00 by a jury under common law principles. *See also* Rourke v. Garza, 530 S.W.2d 794, 797 (Tex. 1975) (workmen's compensation in the amount of $35,326.42 received for injury valued by jury at $303,126.42).

229. See note 233 *supra*. *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 531 (4th ed. 1971) (statutory compensation is sole remedy).

230. *See* Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 HARV. L. REV. 328, 333 (1912); *see also* Boggs v. Blue Diamond Coal Co., 590 F.2d 655, 660 (6th Cir. 1979), *cert. denied*, 444 U.S. 836 (1980).

231. *See* Farley v M M Cattle Co., 529 S.W.2d 751, 754-57 (Tex. 1975); Leadon v. Kimbrough Bros. Lumber Co., 484 S.W.2d 567, 569 (Tex. 1972); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 526-27 (4th ed. 1971).

232. Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 HARV. L. REV. 328, 333 (1912).

233. The authors use this term to connote that the employer is liable for the full amount of common law damages, as opposed to the scant worker's compensation award.

234. Bohlen, *A Problem in the Drafting of Workmen's Compensation Act*, 25 HAR. L.

tionally, the enhanced compensation generally will not shut down a business, while to deprive a worker and his family just compensation will be to their economic destruction.[235]

The major argument against enhanced compensation or preservation of common law remedies is that it "would encourage malingering and trumped-up claims."[236] This argument, however, is exaggerated. No one suggests that the no fault provisions of worker's compensation be applied to the enhanced compensation or common law claim. Rather, these actions would require the employee to establish his employer's negligence and that the employer's negligence was a proximate cause of his injury.[237] The establishment of such claims, as shown by the lack of successful actions at common law, would weed out the invalid claims. This is not to say that workers' compensation should be abolished—such acts do perform a vital social function[238]—but where the injured employee has a valid common law claim, the act designed to ensure the worker's dignity and economic needs[239] should not deprive him of the full recovery to which he is entitled.[240] The result is that workers' compensation has deprived many people of their life, liberty and property by removing their common law remedy.[241] It is at the crust of

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REV. 328, 333 (1912).

235. *Id.* at 334.

236. Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 214 (1952).

237. *See* Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 HARV. L. REV. 328, 333 (1912) (enhanced compensation or common law rights preserved in cases where employer at fault); *see also*, Farley v. M M Cattle Co., 529 S.W.2d 751, 754-57 (Tex. 1975) (common law requires proof of negligence and proximate cause); Leadon v. Kimbrough Bros. Lumber Co., 484 S.W.2d 567, 569 (Tex. 1972) (employee must prove that employer was negligent and that such negligence was proximate cause of injury); W. PROSSER, HANDBOOK OF THE LAW OF TORTS at 526-27 (4th ed. 1971).

238. The worker's compensation acts perform a vital social function by providing relief to injured employees who otherwise may become a burden to society and government by joining welfare rolls. *See* New York Central R.R. Co. v. White, 243 U.S. 188, 197 (1917); Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 209-10 (1952).

239. *See* Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 HARV. L. REV. 328, 333 (1912); Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 210, 213 (1952).

240. In response, it may be argued that worker's compensation requires the employer to pay the injured employee even when the employer is not at fault, but this is incorrect since it is the consumer and not the employer who pays the cost of worker's compensation. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS at 530-31 (4th ed. 1971).

241. *Cf.* New York Central R.R. Co. v. White, 243 U.S. 188, 201 (1917) (doubtful

our society that he who is at fault should bear the loss, but here the innocent employee is required to bear the loss, for the acts of his negligent employer.[242]

In *New York Central Railroad Company v. White*,[243] The United States Supreme Court addressed the question whether the State could, without violating the due process clause, set aside the common law rights and establish the workers' compensation system.[244] The Court doubted whether the State could abolish all rights without establishing an adequate substitute.[245] The Court found the workers' compensation statutes to be an adequate substitute for the common law remedies.[246] On the point of compensation, the Supreme Court stated:

> If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of damages.[247]

Thus, the Court found that the reduced expense and delay of the administrative process equaled the additional damages obtainable through the common law cause of action.[248] In 1917 the trade-off of limited damages for the absence of the common law defenses was favorable to the employee.[249] Given the transition of the law over

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whether state could abolish common law rights without establishing an adequate substitute).

242. The worker's compensation acts limit the employee to the statutory recovery. Thus in a case where the employer is the sole party at fault, or jointly with the injured employee, the injured party would be limited to the scant worker's compensation where a common law recovery may be ten to twenty times greater. *Cf.* Petro-Weld, Inc. v. Luke, 619 F.2d 418, 419 (5th Cir. 1980) ($19,225.18 in compensation for injury valued at $400,000.00 at common law); Rourke v. Garza, 530 S.W.2d 794, 797 (Tex. 1975) ($35,326.42 worker's compensation compared to $303,126.42 at common law).

243. 243 U.S. 188 (1917).

244. *See id.* at 201.

245. *See id.* at 201.

246. *See id.* at 201.

247. *Id.* at 201.

248. *See id.* at 201. In fact, in Hawkins v. Bleakly, 243 U.S. 210, 214 (1917), the United States Supreme Court accepted the view of the lawmaker that the workmen's compensation act was more beneficial to the employee than the common law rules of employer liability. *Accord* New York Central R.R. Co. v. White, 243 U.S. 188, 201 (1917).

249. *See* New York Central R.R. Co. v. White, 243 U.S. 188, 201 (1917); Hawkins v. Bleakly, 243 U.S. 210, 214 (1917).

the past sixty-three years, however, the exchange is no longer equitable.

In 1917 the workers' compensation statutes were an adequate substitute for the common law cause of action because its remedy was certain, speedy, and less expensive.[250] At that time it was estimated that the average working man could exist no longer than two weeks without some income; thus, it was perceived that worker's compensation would put money into the injured employee's hands within that time period.[251] Although the average employee may not be able to hold out any longer today, we know that the administrative process is not so swift or certain.[252] The employee's right to compensation and the amount thereof are contested through the entire administrative process, and often into the courts. Even when a compromised settlement can be obtained, it often occurs months after the employee was injured and put out of work. Workers' compensation is not the swift, certain harmonious relationship between the employer and employee as imagined; it has become a battle of experts where the degree of injury and amount of compensation are contested. Additionally, the common law defenses of assumption of the risk, contributory negligence, and the fellow servant rule have been greatly diminished or abolished.[253] Thus, the trade-off[254] evidenced by workers' compensation

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250. *See* New York Central R.R. Co. v. White, 243 U.S. 188, 201 (1917).

251. Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 HARV. L. REV. 328, 331 (1912); *see* New York Central R.R. Co. v. White, 243 U.S. 188, 201 (1917) (swift and certain remedy).

252. The two week waiting period for the initiation of worker's compensation payments envisioned by the United States Supreme Court in *New York Central R.R.* has become a thing of the past. In fact, the Texas Industrial Accident Board may allow the insurance carrier an average of 30 days from date of incapacity to the date compensation is instituted. *See* Rule 061.12.00.020, RULES OF INDUSTRIAL ACCIDENT BOARD (1977). The Texas quarterly performance ratings often reveal several insurance carriers that average in excess of three weeks before instituting compensation payments. In individual cases, compensation may be withheld months without sanction to the insurance carrier. A request for an adminstrative hearing to compel the institution of compensation payments may yield a hearing several weeks to months later depending upon the congestion of the hearing examiner's calendar.

253. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 533-34 (4th ed. 1971); *see* Reboni v. Case Bros., 78 A.2d 887, 889 (Conn. 1951) (fellow servant rule practically disappeared with adoption of workmen's compensation); Crenshaw Bros. Produce Co. v. Harper, 194 So. 353, 360 (Fla. 1940) (employee does not assume risks caused by master's negligence nor the negligence of those for whom the master is responsible); Ritter v. Beals, 358 P.2d 1080, 1086-87 (Ore. 1961) (en banc) (employee does not assume risk arising out of employer's negligence); Farley v MM Cattle Co., 529 S.W.2d 751, 758 (Tex. 1975) (*volenti*-assumption

is no longer equitable today, and, consequently, the deprivation of the injured employee's common law cause of action may violate the due process clause.[255] This is not to throw the workers' compensation system out with the bathwater, but the remedy must be an adequate substitute for the common law remedy,[256] i.e., the employee should be entitled to enhanced compensation or common law damages when he is able to establish the common law liability of his employer.[257]

B. *Is The Employer—The Third Party Cause Of Action*

Although workers' compensation has abated many of the employee's common law rights, the courts agree that every presumption should be on the side of preserving these rights in the absence of compelling statutory language or social policy justification.[258] In this respect, it is important to note that workers' compensation laws attempt to regulate the employee's rights with respect to his

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of the risk defenses are abolished in negligence actions); Siragusa v. Swedish Hosp., 373 P.2d 767, 773 (Wash. 1962) (en banc) (limitation upon contributory negligence and assumption of the risk defenses); TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1982) (comparative negligence replacing contributory negligence).

The fellow servant rule is a peculiar defense associated with employer-employee actions. It is based upon the fiction that "the fellow workman's negligence is one of the natural and ordinary risks of the occupation assumed by the employee." New York Central R.R. Co. v. White, 243 U.S. 188, 198-99 (1917); *see* F. HARPER, LAW OF TORTS 292 (1933). It is a form of the *volenti* or assumption of the risk defense. F. HARPER, LAW OF TORTS 292 (1933). Thus, with the abolition of the *volenti* defenses in negligence cases in Texas and other states, it appears that the fellow servant rule is additionally reduced to the question of the employee's comparative negligence. *See* Farley v. MM Cattle Co., 529 S.W.2d 751, 758 (Tex. 1975) (assumption of the risk abolished as defense in negligence cases). In fact, no reported Texas case has applied the fellow servant rule since the *Farley* decision. The last reported Texas decision to apply the fellow servant rule instructed the trial court to consider the effect of the *Farley* decision. *See* Cactus Drilling Co. v. Williams, 525 S.W.2d 902, 912 (Tex. Civ. App.—Amarillo, 1975, writ ref'd n.r.e) (on motion for rehearing).

254. Limited damages were traded for the surrender of common law defenses. *See* New York Central R.R. Co. v. White, 243 U.S. 188, 201 (1917); W. Prosser, HANDBOOK OF THE LAW OF TORTS 531 (4th ed. 1971).

255. *See* New York Central R.R. Co. v. White, 243 U.S. 188, 201 (1917) (due process may be violated unless common law remedy is replaced by adequate substitute).

256. *See id.* at 201.

257. Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 HARV. L. REV. 328, 333 (1912).

258. *See* Boggs v. Blue Diamond Coal Co., 590 F.2d 655, 660 (6th Cir. 1970), *cert. denied*, 444 U.S. 836 (1980); 2 A. Larson, THE LAW OF WORKMEN'S COMPENSATION § 72.50 (1976).

employer; they do not affect the employee's rights against one other than his employer.[259] This is an important concept because not all injuries are the exclusive fault of the employer; very often a third party—someone other than the injured employee or his employer—may be at fault. If this other party is not the employer, then the employee can maintain a true common law action against this party without any artificial limitation upon his damages.[260] Thus, in evaluating the employee's right to compensation for workplace injuries, it is necessary to consider if someone other than the employer is at fault. Since only the employer can hide behind the limited damages shield of workers' compensation,[261] a vital issue is the determination of who is "the employer" under the workers' compensation statutes.

Although most workers' compensation statutes have a provision defining the term "employer," the relationship is generally determined under common law agency rules.[262] Until recently, one of

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259. *See, e.g.*, Boggs v. Blue Diamond Coal Co., 590 F.2d 655,657 (6th Cir. 1979), *cert. denied*, 444 U.S. 836 (1980). Kentucy's Act grants immunity from common law negligence to "employer"), *cert. denied*, 444 U.S. 836 (1980); O'Brien v. Grumman Corp., 475 F.Supp. 284, 291 (S.D.N.Y. 1979) (Georgia worker's compensation permits employee to sue third party tortfeasor despite compensation award against employer); Thomas v. Hycon, Inc., 244 F.Supp. 151, 153 (D.D.C. 1965) (one "other than the employer" not immune under Maryland Workmen's Compensation Act); Wagstaff v. City of Groves, 419 S.W.2d 441, 444 (Tex. Civ. App.—Beaumont 1967, writ ref'd n.r.e.) (Texas' act maintained employee's right to bring common law action against third party tortfeasor).

260. *See* Booth v. Seaboard Fire & Marine Ins. Co., 431 F.2d 212, 219-20 (8th Cir. 1970) (Nebraska law does not permit third party tortfeasor a set-off for plaintiff's workmen's compensation); Bedwell v. Riddle, 345 F.2d 183, 183 (5th Cir 1965) (per curiam) (injured plaintiff entitled to entire damages arising from injury from third party under Mississippi law); Gundolf v. Massman-Johnson, 473 S.W.2d 70, 75 (Tex. Civ. App.—Beaumont 1971), *writ re'd n.r.e.*, 484 S.W.2d 555 (Tex. 1972) under Texas law plaintiff entitled to full amount of damages in third party action), It is to be noted, however, that the injured employee is generally entitled to only one recovery; therefore, the compensation carrier may be entitled to subrogation for sums previously paid the employee. *See* Bedwell v. Riddle, 345 F.2d 183, 183 (5th Cir. 1965) (per curiam) (compensation carrier entitled to subrogate payments from third party judgment).

261. *See, e.g.*, Boggs v. Blue Diamond Coal Co., 590 F.2d 655, 663 (6th Cir. 1979) (Kentucky law), *cert. denied*, 444 U.S. 836 (1980); O'Brien v. Grumman Corp., 475 F.Supp. 284, 290-93 (S.D.N.Y. 1979) (Georgia law); Thomas v. Hycon, Inc., 244 F.Supp. 151, 153 (D.D.C. 1965) (Maryland law).

262. The employer-employee relationship is generally determined by the right to hire and fire, the payment of wages, the carrying of the employee on income and social security tax rolls, and the furnishing of tools. The most decisive criteria, however, is the right of the alleged "employer" to control the performance and manner of the servant's work. *See* Lemonvich v. Klimoski, 315 F.Supp. 1290, 1292 (W.D. Pa. 1970); Thomas v. Hycon, Inc., 244

the major problem areas was the borrowed servant or dual employment situation.[263] This situation, however, has become so common that a definite rule can be stated, as expressed by Arthur Larson:

> When a general employer lends an employee to a special employer, the special employer becomes liable for worker's compensation only if
>
> (a) the employee has made a contract for hire expressed or implied, with the special employer;
>
> (b) the work being done is essentially that of the special employer; and
>
> (c) the special employer has the right to control the details of the work.
>
> When all three of the above conditions are satisfied in relation to both employers, both employers are liable for worker's compensation.
>
> Employment may also be "dual," in the sense that while the employee is under contract of hire with two different employers, his activities on behalf of each employer are separate and can be identified with one employer or the other. When this separate identification can clearly be made, the particular employer whose work was being done at the time of the injury will be held exclusively liable.[264]

With the emergence of the conglomerate corporations a new "employer" question has arisen: whether a parent or subsidiary corporation is immune from common law liability for its tortious acts which injure the employees of its sibling, subsidiary, or parent corporation.[265] Most courts have found that each corporation is liable for its own separate acts and, therefore, are not a single employers for workers' compensation or third-party actions.[266]

F.Supp. 151, 155 (D.D.C. 1965); United States Fidelity & Guaranty Co. v. Goodson, 568 S.W.2d 443, 446 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.).

263. *See* Riesenfeld, *Contemporary Trends in Compensation for Industrial Accidents Here and Abroad*, 42 CALIF. L. REV. 531, 538-39 (1954).

264. 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 48 (1976); *see* Latham v. Technar, Inc., 390 F.Supp. 1031, 1038 (E.D. Tenn. 1974); *see also* Sanchez v. Legett, 489 S.W.2d 383, 387 (Tex. Civ. App.—Corpus Christi 1972, writ ref'd n.r.e).

265. *See* Boggs v. Blue Diamond Coal Co., 590 F.2d 655, 658-663 (6th Cir. 1979), *cert. denied*, 444 U.S. 836 (1980); O'Brien v. Grumman Corp., 475 F.Supp. 284, 290-93 (S.D.N.Y. 1979); Latham v. Technar, Inc., 390 F.Supp. 1031, 1034-37 (E.D. Tenn. 1974); Thomas v. Hycon, Inc., 244 F.Supp. 151, 154-55 (D.D.C. 1965).

266. *See* Boggs v. Blue Diamond Coal Co., 590 F.2d 655, 663 (6th Cir. 1979), *cert. denied*, 444 U.S. 835 (1980); O'Brien v. Grumman Corp., 475 F.Supp. 284, 292 (S.D.N.Y. 1979);

A classic illustration of the conglomerate problem can be seen in the *O'Brien v. Grumman Corporation*[267] decision. In this case, Mr. O'Brien died while in the course and scope of his employment when he crashed in an airplane manufactured by Grumman Corporation.[268] At the time the plan in question was constructed, Mr. O'Brien was an employee of the Grumman Corporation, but he had subsequently been transferred to a subsidiary corporation, Grumman American, his employer at his death.[269] Mr. O'Brien's survivor brought a wrongful death and survivorship action against Grumman Corporation and Grumman Aerospace Corporation alleging that the plane was improperly designed.[270] The Grumman and Grumman Aerospace corporations asserted that the plaintiff's cause of action was barred by the applicable workers' compensation statutes because they were the employers of Mr. O'Brien.[271] The court found that Grumman, Grumman Aerospace, and Grumman American were three separate corporations, and held that an employee of a subsidiary corporation is not barred by workers' compensation from suing the subsidiary's parent or sibling corporation.[272]

The "employer" question with respect to multicorporation con-

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Latham v. Technar, Inc., 390 F.Supp. 1031, 1037-1038 (E.D. Tenn. 1974); Thomas v. Hycon, Inc., 244 F.Supp. 151, 156 (D.D.C. 1965); Thomas v. Maigo Corp., 323 N.Y.S.2d 106, 106 (App. Div. 1971); Daisernia v. Co-Operative G.L.F. Holding Corp., 270 N.Y.S.2d 542, 543 (App. Div. 1966); Foley v. New York City Omnibus Corp., 112 N.Y.S.2d 217, 218 (Sup. Ct. 1952); Phillips v. Stowe Mills, Inc., 167 S.E.2d 817, 819 (N.C. Ct. App. 1969). *But see* Goldberg v. Context Ind., Inc., 362 So.2d 974, 974 (Fla. Dist. Ct. App. 1978) (per curiam) (employee of subsidiary corporation barred from suing parent where both corporations are on a single workmen's compensation policy.).

267. 475 F.Supp. 284 (S.D.N.Y. 1979) (applying Georgia law).

268. *Id.* at 291.

269. *See id.* at 291. In fact, Mr. O'Brien was an employee of Grumman Corporation until 1969 when he was transferred to Grumman Aerospace Corporation, a wholly owned subsidiary of Grumman corporation. *Id.* at 286, 291. In 1974, Mr. O'Brien was transferred to the Grumman American Corporation, a partially owned subsidiary of Grumman and Grumman Aerospace Corporations. *Id.* at 286, 291.

270. *See id.* at 286.

271. *Id.* 290-91.

272. *See id.* at 291-92; *see also* Boggs v. Blue Diamond Coal Co., 590 F.2d 655, 663 (6th Cir. 1979), *cert. denied,* 444 U.S. 836 (1980); Latham v. Technar, Inc., 390 F.Supp. 1031, 1037-38 (E.D. Tenn. 1974); Thomas v. Hycon, Inc., 244 F.Supp. 151, 156 (D.D.C. 1965); Thomas v. Maigo Corp., 323 N.Y.S.2d 106, 106 (App. Div. 1971); Daisernia v. Co-Operative G.L.F. Holding Corp., 270 N.Y.S.2d 542, 543 (App. Div. 1966); Foley v. New York City Omnibus Corp., 112 N.Y.S.2d 217, 218 (Sup. Ct. 1952); Phillips v. Stowe Mills, Inc., 167 S.E.2d 817, 819 (N.C. Ct. App. 1969).

glomerates is a matter of corporation law rather than workers' compensation principles.[273] The workers' compensation statutes were drafted before the "multi-unit enterprise became the norm in American economy."[274] Therefore, they did not anticipate or confront the conglomerate problem. The courts have determined this question under the principles for "piercing the corporate veil."[275] If the corporations are in fact separate, then they are not one employer for worker's compensation purposes.[276] Such questions as common workers' compensation insurance policies,[277] similar enterprises,[278] and similar control or management[279] are irrelevant.[280] Only if both corporations are so integrated to be considered as one,

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273. *See* Boggs v. Blue Diamond Coal Co., 590 F.2d 655, 662 (6th Cir. 1979), *cert. denied*, 444 U.S. 836 (1980).

274. *Id.* at 658.

275. *See id.* at 662; O'Brien v. Grumman Corp., 475 F.Supp. 284, 291 (S.D.N.Y. 1979); *see also* Thomas v. Hycon, Inc., 244 F.Supp. 151, 155 (D.D.C. 1965).

276. *See, e.g.*, Boggs v. Blue Diamond Coal Co., 590 F.2d 655, 662 (6th Cir. 1979), *cert. denied*, 444 U.S. 836 (1980); O'Brien v. Grumman Corp., 475 F.Supp. 284, 291 (S.D.N.Y. 1979); Phillips v. Stowe Mills, Inc., 167 N.E.2d 817, 819 (N.C. Ct. App. 1969).

277. *See* O'Brien v. Grumman Corp., 475 F.Supp. 284, 291 (S.D.N.Y. 1979); Latham v. Technar, Inc., 390 F.Supp. 1031, 1037 (E.D. Tenn. 1974); Thomas v. Hycon, Inc., 244 F.Supp. 151, 154 (D.D.C. 1965). *But see* Goldberg v. Context Ind., Inc. 362 So.2d 974, 974 (Fla. Dist. Ct. App. 1978) (per curiam).

278. *See* Boggs v. Blue Diamond Coal Co., 590 F.2d 655, 657-58 (6th Cir. 1979), *cert. denied*, 444 U.S. 836 (1980); O'Brien v. Grumman Corp., 475 F.Supp. 284, 286 (S.D.N.Y. 1979); Foley v. New York City Omnibus Corporation, 112 N.Y.S.2d 217, 218 (Sup. Ct. 1952); Phillips v. Stowe Mills, Inc., 167 S.E.2d 817, 818 (N.C. Ct. App. 1969).

279. *See* Thomas v. Maigo Corp., 323 N.Y.S.2d 106, 106 (App. Div. 1971); Foley v. New York City Omnibus Corp., 112 N.Y.S.2d 217, 218 (Sup. Ct. 1952); Phillips v. Stowe Mills, Inc., 167 S.E.2d 817, 818 (N.C. Ct. App. 1969).

280. In Latham v. Technar, Inc., 390 F.Supp. 1031, 1037 (E.D. Tenn. 1974), the court explained that common identity, commixture of activity, common insurance, and common management are factors for determining whether two entitites are in face one employer for worker's compensation purposes, but that these factors are not conclusive and may be overridden by other factors which establish that the entities are in fact separate. *Accord*, Boggs v. Blue Diamond Coal Co., 590 F.2d 655, 662 (6th Cir. 1979), *cert. denied*, 444 U.S. 836 (1980) (corporations are separate when they can take advantage of dividing business into separate corporate parts); O'Brien v. Grumman Corp., 475 F.Supp. 284, 292 (S.D.N.Y. 1979) (common insurance and fact that employee formerly worked for third party is irrelevant where entities are separate); Thomas v. Hycon, Inc., 244 F.Supp. 151, 155 (D.D.C. 1965) (corporations must be totally integrated to be considered one "employer"); Thomas v. Maigo Corp., 323 N.Y.S.2d 106, 106 (App. Div. 1971) (wholly owned subsidiary controlled, dominated, and financed by parent still a separate and distinct legal entity); Foley v. New York City Omnibus Corp., 112 N.Y.S.2d 217, 218 (Sup. Ct. 1952) (same management, officers and business not sufficient to find entities as one "employer"); Phillips v. Stowe Mills, Inc., 167 S.E.2d 817, 818, 819-20 (N.C. C.t App. 1969) (separate entities despite same officers, management and work complex).

may the be held as one single employer protected by workers' compensation.[281] Thus, if the corporations can take advantage of the benefits of dividing the business into separate corporate entitites, then reciprocity requires the courts to uphold the separate identities of the corporations when sued by the injured employee.[282] Each corporation, therefore, is liable for its own tortious acts, and only the employing corporation is immune from common law liability under workers' compensation statutes.[283]

IV. CONCLUSION

In the area of workplace safety, the employee has both prophylactic and compensatory rights. The former are designed to protect the employee by promoting safe workareas, thereby preventing the injury in the first place. Prophylactic measures include safety inspections and the abatement of hazardous work conditions through the Occupational Safety and Health Act. Under certain circumstances the employee may also be justified in walking-off the worksite under OSHA, LMRA, or NLRA, in order to avoid or correct unsafe work conditions. Thus, the employee is no longer forced to work when confronted with the choice between not performing assigned tasks or subjecting himself to potential injury or death. The employee may avoid the hazardous workarea without fear of subsequent discrimination.

Compensatory rights protect the employee by providing economic stability to the injured employee. Under workers' compensation acts the employee need not prove fault in order to retain a recovery. The system is one of social justice designed to insure that the injured employee receives sufficient income and medical care to keep him from destitution. Workers' compensation was also

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281. *See* Boggs v. Blue Diamond Coal Co., 590 F.2d 655, 662 (6th Cir. 1979), *cert. denied*, 444 U.S. 836 (1980); Thomas v. Hycon, Inc., 244 F.Supp. 151, 155 (D.D.C. 1965). In *Thomas v. Hycon, Inc.* the United States District Court for the District of Columbia stated that a non-employing holding company may be held as a single "employer" with the corporation for which it holds the assets. A holding corporation was held to be separate and, thereby, liable in a third party action in Daisernia v. Co-Operative G.L.F. Holding Corp., 270 N.Y.S.2d 542, 543 (App. Div. 1966).

282. Boggs v. Blue Diamond Coal Co., 590 F.2d 655, 662 (6th Cir. 1979), *cert. denied*, 444 U.S. 836 (1980).

283. *See, e.g.*, Boggs v. Blue Diamond Coal Co., 590 F.2d 655, 661-63 (6th Cir. 1979), *cert. denied*, 444 U.S. 836 (1980); O'Brien v. Grumman Corp., 475 F.Supp. 284, 290-93 (S.D.N.Y. 1979); Phillips v. Stowe Mills, Inc., 167 S.E.2d 817, 819-20 (N.C. Ct. App. 1969).

designed with the intent to promote the correction of hazardous workareas by the employer. With the passage of time, however, the egalitarian goals of workers' compensation have slumbered. Workers' compensation was perceived as a swift and certain remedy which provides moderate compensation without the adversary conflict of the common law tort system. Today, however, the system is not so swift or certain and *de novo* appeals embrace the problems of the common law adversary system. Though workers' compensation provides a needed remedy to those who are remediless at common law, a sense of social justice is lacking for those who are deprived of their common law rights.